DCPI 2012/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2012 OF 2008

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BETWEEN

YIP YUEN NEUNG SHIRLEY Plaintiff

and

LEE SZE WAI trading as 蝦碌美食 Defendant

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Coram: His Hon Judge Leung in Court

Date of hearing: 19-21 August 2009

Date of judgment: 21 August 2009

**J U D G M E N T**

1. On 3 March 2008 at about 1 pm, 42-year-old Yip, the Plaintiff visited the restaurant operated by Lee, the Defendant, at Shop C on the Ground Floor of Hing Fat Building, Smithfield Road, Hong Kong. At a certain point, Yip went to use the toilet situated at the backyard outside the restaurant. She stepped on an iron manhole cover in front of the entrance of the toilet compartment and sprained her right ankle.
2. Yip claims damages. Both liability and quantum of damages are in dispute. The issues are:
   1. how the accident happened;
   2. whether Lee is liable as the occupier;
   3. whether Lee is liable in negligence;
   4. whether Yip was contributorily negligent; and
   5. the quantum of damages.

**THE ACCIDENT**

1. Yip gave evidence. She was at the time of the accident and still is a registered social worker of Caritas Hong Kong. On that day, Yip went with 4 colleagues to the restaurant for lunch. It was a busy hour there. This was the first time Yip went to the restaurant.
2. A middle-aged waitress inside the restaurant waved her hand and asked them to enter. They followed the waitress, passed the area where the food was being prepared, and ended up in a back portion of the restaurant. The waitress opened a folding table for Yip and her colleagues.
3. Yip wanted to go to the toilet. Being her first time at the restaurant, Yip asked the waitress for direction. The waitress pointed her to a white door at the back of the room and indicated that she would find the toilet right outside. Yip went as directed and pushed open the white door to the backyard.
4. The front and the back portion of the restaurant as well as the door and the toilet compartment outside are depicted in the photographs produced during the trial.
5. Upon entering the toilet compartment, Yip discovered that there was no toilet paper. She intended to return to her colleagues to ask for some tissue paper. As soon as she stepped out of the toilet compartment, her right foot landed on what she stated as a “broken hole” on the ground. It became clear from the photographs that it was an iron manhole cover right in front of the entrance of the toilet compartment. She sprained her right ankle. The immense pain caused her to yell. She stood with her left foot and borrowed support by using her right hand to lean on the toilet door.
6. One of Yip’s colleagues came to her. Others followed and helped Yip back to their table in the restaurant. They complained to the waitress who suggested that she would fetch a carpet or mat to cover the “hole”. After lunch, Yip hopped on one foot out of the restaurant with the help of her colleagues.
7. Yip’s evidence was corroborated by Chow, the colleague who first came to assist her after the accident. Despite the suggestions made to them during cross-examination, I do not find the evidence of Yip and Chow in this respect to have been effectively challenged.
8. Lee, who gave evidence, also confirmed the existence of such a waitress helping out at the restaurant at the material time. She revealed in court for the first time that she was also present by the cashier at the front of the restaurant at the material time. Despite suggestion that she was not aware of any accident on that day, I do not find that she managed to contradict Yip’s account of what happened. Between them, I prefer Yip’s evidence in case of discrepancy.
9. There is dispute as to whether there were the telephone conversations since the accident between Yip’s husband and Lee and during which Lee allegedly admitted responsibility. In my view, such dispute is immaterial.

**OCCUPIER’S LIABILITY**

1. In the statement of claim, the premises for the purpose of occupier’s liability is pleaded to be Shop C. Lee was pleaded to be the occupier of the restaurant at Shop C and therefore under the common duty to take reasonable care to ensure that Yip would be reasonably safe in using the restaurant. One can only understand the pleading to mean that the toilet in question was in the premises, i.e. the restaurant at Shop C.
2. Lee was one of the 3 co-owners of 1/30th undivided share in the land as described in the relevant Assignment together with the sole and exclusive right to and privilege to use and occupy Shop C, being merely part of the land. It is clear from the evidence and the floor plans that the toilet compartment in question and the iron manhole cover are situated in the backyard outside Shop C.
3. There is no pleading of Lee being also the occupier of the area outside the restaurant at Shop C and hence the basis for attributing liability to Lee as such an occupier of such area.
4. Even if I am to consider the liability of Lee as an occupier of the backyard including the toilet compartment outside the restaurant, there would still be the question of whether all the owners, or the incorporated owners, should be the proper defendant for an accident like the present one. Indeed, according to Lee in court, which was not really challenged, she had seen cleaner engaged by the incorporated owners carry out cleaning to the toilet compartment before.
5. In short, Yip is bound by her own pleading. The claim for breach of occupier’s liability cannot stand.

**NEGLIGENCE**

1. It was argued on behalf of Lee that she owed no duty of care to Yip in respect of her safety in using the toilet compartment at the backyard. Alternatively, she was not in breach of such duty.
2. The evidence is that between the restaurant and the backyard, there was a wooden door. This was the white door that Yip opened. There was an outer iron door. In court, Lee explained that the iron door was normally locked. By that, she meant once closed, the iron door could not be opened from the outside at the backyard but could still be opened from inside the restaurant. The iron door depicted in the photographs was somehow kept in an open state.
3. The evidence shows that there was in fact toilet facility inside the restaurant at the back portion near where Yip and her colleagues sat on that day. It is alleged that Yip elected to go to the toilet at the backyard instead of using such toilet inside the restaurant.
4. The toilet inside the restaurant was a room with a door. The existence of a water heater inside suggests that this might also be a bathroom. Anyway, according to Yip, the door of that room was closed at the material time. She did not notice any sign on the door indicating that it was a toilet. Lee said to the contrary in her evidence, suggesting that there was such a sign on that door.
5. I believe in Yip. Without knowledge about the toilet facility inside the restaurant, Yip could not have elected to use the toilet at the backyard as alleged. But the difference between Yip and Lee in this regard is actually immaterial. The fact, as I find above, was that Yip asked and the waitress did direct her to use the toilet at the backyard. Yip had no reason not to follow the direction.
6. In my view, attending to the customers’ request to use toilet facility must be part of the business concern of the restaurant. There was sufficient proximity between the restauranteur and Yip to give rise to the duty on the part of the restauranteur to see that Yip would be reasonably safe in following such direction to the toilet facility and to use it. The duty arose even assuming that this was an isolated occasion. The real question is whether Lee was in breach of such duty.
7. The photographs depicting the manhole cover suggest that the manhole cover was not levelled with the surrounding area. The condition of the cover cannot be described as pleasant looking. Yip described the cover as indented or uneven. Chow described the edge of the cover as indented and she identified it in the photograph (exhibit P1). It was suggested on behalf of Lee that the manhole cover was flat with only the circular edge being indented relative to the surrounding. It was therefore not dangerous. Considering all the evidence, I have difficulty in agreeing.
8. It was suggested that there has not been any accident like the present one before. In my view, this can only be a neutral factor. I do not wholly accept Lee’s suggestion that she had no control over the area. But quite irrespective of the degree of her control, she could have taken steps to alleviate the potential danger.
9. In her evidence, Lee could think of putting up a warning sign like that about slippery floor. I also see no practical difficulty in placing a mat over the manhole cover. As mentioned above, this was, according to Chow, what the waitress suggested after their complaint about the accident. If Lee takes the view that this should be the responsibility of the incorporated owners, she, as one of the owners, could and should have caused such body to take the necessary steps.
10. I find that the manhole cover relative to its surrounding area and being located right in front of the toilet compartment did pose a potential danger to its users, particularly customer who might visit there for the first time. Accident like the present one was reasonably foreseeable. Effectively admitting not having taken any step to alleviate the potential danger, Lee should be liable.

**CONTRIBUTORY NEGLIGENCE**

1. Much was said about whether Yip should have seen the manhole cover and taken care. In her evidence, she admitted not having paid attention to that part of the ground. Yip also managed to enter the toilet unharmed and sprained her ankle only upon exiting the toilet.
2. In my view, one should understand the circumstances then in a realistic manner. This was Yip’s first time at the restaurant. She had no idea about the layout or what to expect after opening the door to the backyard, apart from the toilet that she looked for.
3. Judging from the photographs, once through the door, she would find the toilet just to her right. She entered the toilet and there is no evidence that she stepped on the manhole cover. Seeing no toilet paper inside the toilet, she exited and stepped on the manhole cover only then. The whole sequence, one can infer, should take a matter of seconds.
4. According to her, she was then wearing a pair of flat sole leather shoes. There is no evidence she conducted herself in any extraordinary way at the time either.
5. The case of alleged contributory negligence was not really put to Yip during the trial. But considering the circumstances of this case, I do not find that Yip is to blame for contributing to the accident.

**QUANTUM**

**Injuries and treatment**

1. Yip consulted a registered Chinese bonesetter for treatment that afternoon and on the following day. On 5 March 2008, she was admitted to the hospital. Upon examination, there was gross swelling and tenderness over her right foot and ankle. Her right foot could not bear weight. There was marked pain on her ankle movement. X-ray of the right foot showed a fracture of the 4th metatarsal bone. Provisional diagnosis was right ankle ligament injury and crack fracture of the 4th metatarsal of the right foot.
2. A short leg plaster was put on for immobilisation and rest while a course of physiotherapy was prescribed. She was discharged 6 days later when she needed a pair of crutches for walking. The plaster was removed 3 weeks later.
3. Yip was then admitted for inpatient physiotherapy for slightly more than 2 weeks when she could walk well with crutches.
4. Sick leave was given to Yip until 23 May 2008 when she was last seen by the hospital. Then the swelling had subsided but she still had mild residual right ankle pain especially when walking. The range of ankle motion was satisfactory. Occasional intake of analgesic for relief was necessary.

**Present complaint**

1. Yip attended a joint examination by Dr Johnson Lam (engaged on her behalf) and Dr Lau Hoi Kuen (engaged on behalf of Lee) on 12 March 2009. They produced their report dated 19 March 2009.
2. This was about a year after the accident. Yip mainly complained to the doctors about intermittent pain over her right foot and ankle. The pain increased with standing after sleep or prolonged sitting, walking up and down stairs, as well as change of weather. But she could walk up and down stairs in the normal fashion. She also complained about pain in her left knee.
3. According to her, she no longer practised aerobics or step dance which she used to do. She had a membership for aromatherapy (body massage, etc) but dared not make use of it after the accident.
4. Yip also complained about right foot swelling with prolonged standing such as after taking shower. She could wear leather shoes but not high heels. There was still pain. She also felt easy fatigue, headache and bone ache.

**Medical expert opinion**

1. The doctors agreed on the diagnosis of sprained right ankle with soft tissue injury which was consistent with the mechanism of injury described by Yip. Dr Lam considered the fracture on the 4th metatarsal to be probable while Dr Lau could not identify any definite fracture from the X-rays. In my view, it is safe to infer that such fracture, if existed, was not serious or extensive. In fact, only close reduction was performed.
2. The doctors opined that the left knee pain was due to mild degeneration and the general complaint about fatigue, bone ache and headache were unrelated to the accident.
3. Dr Lam considered the treatment to be appropriate. Dr Lau opined that close reduction should not have been needed. He also considered the inpatient physiotherapy after removal of the plaster cast was unduly long and unnecessary. But both agreed that Yip has achieved maximal medical improvement. Both also agreed that the sick leave given was reasonable.
4. Regarding Yip’s residual problem, Dr Lam considered that the degree of injury was likely to be at least moderate. There was probably considerable soft tissue injury to the right ankle and foot. But there was no muscle wasting and the limb power was satisfactory. There was no laxity on the varus and valgus stress test. The anterior drawer test was also negative. Yip has regained satisfactory strength and ranges of motion in the ankle but some genuine residual pain was probable. Activities that caused increased stress to the ankle would cause some discomfort or even pain. But the overall effect on function should be mild. Dr Lau considered the residual pain in her right ankle and foot, if any, should be minimal.
5. As to the impact of her condition on her work, Dr Lam opined that Yip should be able to return to her pre-accident job. Some reduction in work capacity and endurance during outdoor activities was expected. Those causing great stress to the ankle such as hiking should be avoided. Dr Lau opined that any mild residual pain in her right ankle and foot would only cause mild decrease in her efficiency.

**Pain suffering and loss of amenities**

1. Mr Gidwani referred to *Lee Ka Kuen v Hung Shing Environment Recycle Limited*, DCPI 835/2005 (19/6/2008) and my judgment in *Chan Chi Shing v Chan Shu Kuen & Ors*, DCPI 229/2007 (11/2/2009) in support of Yip’s claim for HK$200,000 under this head. Mr Lau suggested a sum of HK$30,000 but he represented that there is a lack of decided cases as comparables.
2. *Lee Ka Kuen* involved fractures of multiple metatarsals that necessitated open reduction and internal fixation, followed by a substantial course of other treatments. *Chan Chi Shing* involved a collapse and compression fracture of vertebra and comminuted intra-circular fracture of calcaneum of right ankle. Considering further the expert opinion recited in both cases, one would clearly conclude that they are far more serious than the present case.
3. Yip has indeed resumed her pre-accident work as a social worker. Taking into account all the circumstances including her personal circumstances, injury, treatment received, degree of residual pain and the assessment by the medical experts, I am of the view that an award of HK$100,000 is fair.

**Special damages**

1. The claim for loss of earnings was abandoned during the trial on the basis that Yip has received full pay during her sick leave period.
2. The claim for loss of earning capacity was likewise abandoned.
3. Miscellaneous special damages claimed were adjusted downwards to a total sum of HK$118,010 and was agreed.

**Summary**

1. The damages are as follows:

PSLA HK$100,000

Miscellaneous special damages HK$118,010

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Total: HK$218,010

1. Up to today, interest on the general damages for PSLA runs at 2% per annum from the date of writ; and interest on miscellaneous special damages runs at half judgment rate from the date of accident.

[*Counsel submits on costs*]

**ORDER**

1. I give judgment against Lee in the sum of HK$218,010 together with interest as aforesaid. Interest from today shall run at the judgment rate until payment. Yip shall have the costs of this action, including any costs reserved. Costs shall be taxed if not agreed. For clarity, I certify the engagement of counsel.

Simon Leung

District Judge

Representation:

Mr Victor GIDWANI instructed by Messrs Yip Tse Tang for the Plaintiff

Mr Lawrence LAU instructed by Messrs Holman Fenwick Willan for the Defendant