#### DCPI79/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 79 OF 2007

BETWEEN

TANG BO LING Plaintiff

and

CHAN PO trading as

CORRYTRON CATERIES Defendant

##### Before: Her Honour Judge H C Wong in Court

Dates of Hearing: 7-8 and 20 August 2008

Date of Delivery of Judgment: 20 August 2008

## J U D G M E N T

1. The Plaintiff claims against the Defendant for damages suffered due to a fall at the Defendant’s restaurant on 13 July 2003. The Defendant denies liability.

The Plaintiff’s Case

1. The Plaintiff and her colleagues who are kindergarten teachers went to the Defendant’s restaurant for a meal before the school’s graduation ceremony at around 11 am on Sunday, 13 July 2003. The Defendant’s restaurant is at the ground floor of Shop 17-19, Block 6, Tsui Ling Garden in Tuen Mun which was just across the shopping centre from the school. It is frequented by some of the staff and teachers of the school before the Defendant’s restaurant closed down in 2005.
2. On 13 July 2003, after the meal the Plaintiff and her colleagues rose to pay the bill at the cashier. Upon following her colleagues to approach the cashier, she suddenly fell and slipped on the floor injuring her left wrist. Her colleagues helped her to get up and sat her down on a chair nearby. After resting for a while, they accompanied her back to the school. On her way back to school, she found her left arm extremely painful and she was not able to lift the arm. She was taken to Tuen Mun Hospital for treatment.
3. At the hospital, she was found to have suffered a fracture of the left wrist, her left distal radius and ulnar styloid. She was treated with close reduction and long arm plaster. After one day of hospitalisation, she was discharged on 14 July 2003.

1. She claimed she felt the Defendant’s restaurant floor was greasy and slippery when she first walked into the restaurant on the day of the accident, and she believed that was the cause of her accident. She claimed she was wearing her teaching uniform that day and a pair of flat-heeled white leather shoes as required by the school when she was on duty.
2. She continued to receive treatments at the out-patient clinic over a period of 12 months and attended 13 sessions of physiotherapy treatments. She was given 6 months of sick leave.
3. The Plaintiff, Miss Tang, suffered long and persistent pain and numbness on her left wrist after the accident and treatment at the Tuen Mun Hospital. The movement of her wrist was restricted and she slept poorly throughout the initial period of her recuperation. Miss Tang complained the strength of her left wrist has still not fully recovered and could not move her left wrist fully and freely. She was told the condition has become permanent.
4. She claimed further that she suffered from continuous residual pain on her left wrist; more so, when the weather changes. Numbness and stiffness of her left wrist also occurred. She is therefore not able to lift heavy objects. She can no longer lift or carry her kindergarten pupils due to fatigue of the left wrist and lack of strength, the restricted left wrist movements had further interfered with her bathing.
5. After the accident, she reduced her social gatherings and activities because she felt embarrassed about her injuries or to discuss them. She claimed she now seldom played basketball and badminton with her children which she used to do quite often before the accident because of the injuries suffered. She had to give up playing volleyball with her team-mates which she used to do once a month.

1. Miss Tang’s evidence is supported by the evidence of her former colleague, Miss Lam Sau-pik, who witnessed the accident. Miss Lam also testified that on the day of the accident she visited the Defendant’s restaurant with the Plaintiff. She also found the Defendant’s floor slippery. She attributed the condition to the roast meat stand next to the back entrance of the restaurant which Miss Lam and the Plaintiff had used to gain access to the restaurant on the day of the accident.
2. She further claimed there were no warning signs or labels attached to the glass doors of the Defendant’s restaurant on the day of the accident or prior to the accident. Miss Lam further claimed that she had returned to the restaurant on the afternoon after the accident to inform the Defendant’s staff of the Plaintiff’s injuries, and she had accompanied the Plaintiff two days later on 15 July 2003 to the Defendant’s restaurant when they were given the details of the Defendant’s insurance agent.

The Defence Case

1. The Defendant admitted the accident involving the Plaintiff at the restaurant on 13 July 2003, but she denied the accident was due to the condition of the floor of the restaurant. She claimed the floor was cleaned three times a day. The roast meat stand was also not in operation in the morning. And she claimed the floor was clean and dry on the day of the accident. She also claimed the Plaintiff met with the accident because she was wearing a pair of high-heeled shoes which had caused her to slip and fall.

1. In paragraph 6 of the Defence, the Defendant pleaded that there was no need to put up any warning signs at the restaurant because the floor of the restaurant was clean and dry. Madam Chan, the Defendant, further claimed the restaurant floor was fitted with non-slip floor tiles. Further, in her September 2007 witness statement, under paragraph 3, she claimed she had placed warning signs warning customers to take caution of the slippery floor at the front and back of the glass doors of the restaurant.
2. Madam Chan called her friend Madam Chan Wing-yung to give evidence in support of the defence. Madam Chan Wing-yung claimed that she was having a meal at the restaurant on the day of the accident. She admitted she did not witness the accident but she did hear a bang sound. Afterwards, she saw the Plaintiff got up from a chair and she had assumed the Plaintiff had fallen in the area where she was sitting. Therefore, she claimed the Plaintiff did not fall down at the corridor of the restaurant. She also claimed she found the floor of the restaurant on that day was not slippery. After she had finished her meal, she left the restaurant.

Liability

1. The principle stated by Megaw LJ in *Ward v Tesco Stores Limited*  [1976] 1 WLR 810 at page 815 is applicable to the issue of liability:

“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 defendant than the absence of fault.”

1. The aforesaid principle has been cited to me by counsel for the Plaintiff, Mr Luk, and the legal representative of the Defendant, Mr Chan. The same passage has been referred and adopted by Sakhrani J in his judgment in the High Court of Hong Kong in the cases of *So Wang Chun v Rainforce Limited and Others*, HCPI64/2006, in his judgment on 9 January 2008 which referring to his own judgment in an earlier case *Wat Kwing Lok v The Kowloon Motor Bus Company (1933) Ltd*  in HCPI936/2005 (date of judgment 20 November 2007) where he held:

“The mere fact of the occurrance of the accident is not sufficient to give rise to a presumption of negligence on the part of the defendant. The burden of proof is on the plaintiff to show on a balance of probabilities 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 defendant than the absence of fault. If, and only if, the plaintiff proves that the unusual event is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden then shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part.”

1. Mr Chan, representing the Defendant, referred me to the Hong Kong Court of Appeal case of *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd trading as The Excelsior*, CACV38/2000 (date of judgment 22 November 2000) where the plaintiff slipped and fell inside the property of the defendant hotel. The Court of Appeal by majority allowed the appeal on the basis that the plaintiff had failed to prove any breach of duty on the defendant’s part.

Findings

1. Indeed, the burden is on the Plaintiff to show the Defendant was in breach of duty when an unusual event occurred which is more consistent with fault on the part of the Defendant than the absence of fault. In the present case, the Plaintiff and her colleague Miss Lam who witnessed the accident testified that in the Defendant’s restaurant floor was slippery and greasy on the day of the accident. Both of them noticed the phenomenon when they walked into the restaurant. Miss Lam went further and said that she could feel the condition of the floor that day was different from previous days she had visited the restaurant. She felt it was greasy and attributed the condition to the roast meat stand spilling grease onto the floor.
2. Miss Tang, the Plaintiff, further claimed that she discovered after she was admitted into hospital that the back of her skirt had been soiled by a dark patch. She claimed it was the grease from the Defendant’s wet floor which got onto her skirt when she fell onto the floor.
3. On the other hand, the Defendant’s witness, Miss Chan Wing-yung, though present at the time of the accident did not see the accident. She only heard a bang sound. She also wrongly believed that Miss Tang had fallen at the same spot where she saw her got up after the accident. She had plainly mistaken the site of the accident to be next to the table and chair where she saw Miss Tang got up after the accident. In fact, that was the chair where Miss Tang was helped into after the accident.

1. Given that Miss Chan made such a mistake in her evidence, it is doubtful if her evidence that the floor of the restaurant was dry and clean could be sustained. In any event, even if the floor where she sat was dry and clean, it does not follow the corridor where Miss Tang fell was also clean and dry on the day of the accident, contrary to the evidence of Miss Tang and her witness Miss Lam.
2. I also have grave doubts as to the veracity of Miss Chan Po, the Defendant. In her defence, she pleaded that the Plaintiff was wearing high-heeled shoes on the day of the accident which was the cause of her fall. Both Miss Tang and Miss Lam testified that both of them were in the school’s teachers’ uniform and wearing flat-heeled white leather shoes required by the school.

1. Further, Miss Chan in her defence pleaded that no warning signs were needed in her restaurant because the floor was clean and dry. At the trial, Miss Chan produced photographs of the front and back of the door showing a ‘caution’ sign warning customers of slippery floors. This is also contrary to Miss Lam’s evidence who said she had been frequenting the Defendant’s restaurant since 1999 and had not seen such signs on the restaurant stalls before the accident.
2. I find Miss Tang and Miss Lam to be honest witnesses. They were able to give exact details of the accident on 13 July 2003, and further, they gave even more details on Miss Lam’s subsequent visits that afternoon and on 15 July 2003. On 15 July, Miss Lam visited the restaurant and alerted the Defendant’s staff of the accident and Miss Tang’s complaint of her injuries.

1. I find the evidence of Miss Chan Po, the Defendant, to be inconsistent, it is also inconsistent with her defence. I find she had probably made up some of her evidence and tailored it according to the defence.
2. I am aware of the relevant principles enunciated in the classic judgment of Erle CJ in the case of *Scott v The London and St Katherine Docks Company* [1865] 3 H & C page 596 at 601 where he held:

“Where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.”

1. The same passage has been adopted in the case of *Ward v Tesco Stores* at pages 813 to 814 of LJ Lawton’s judgment. The present case is just one of such cases where the Plaintiff had successfully shown that she slipped and fell down on the floor of the Defendant’s restaurant and the Plaintiff had also shown she found the Defendant’s restaurant floor greasy before the accident happened.
2. In her own evidence which was supported by her witness Miss Lam, the burden then shifted to the Defendant to show that the accident did not arise from want of care. Even though the Defendant claimed the floor of the restaurant was cleaned three times a day, she was not present when such cleanings were done. She claimed that the restaurant floor was cleaned by the cleaning staff responsible for washing dishes in the kitchen at 10 am, 3 pm and 10 pm or 10.30 pm. She admitted that her shift was between 4 pm and 10 pm each day while her husband would take the early shift in the morning. The Defendant’s husband did not give evidence.

1. The evidence of both Miss Tang and Miss Lam was that on the day of accident no one from the Defendant’s restaurant came up to find out how she was. When Miss Lam returned shortly after Miss Tang was taken to the hospital, Madam Chan’s husband was not present, neither was he there two days later when Miss Tang and Miss Lam returned for the Defendant’s insurance information. It is quite clear in the Defendant’s restaurant, from the evidence, there was no routine supervision of the daily cleaning. Madam Chan’s evidence was not based on facts but mere speculations. It was not from her own knowledge but what she assumed would have been done in her absence.
2. Furthermore, the use of non-slip tiles do not guarantee the floors to be completely slip-free as there are different grades of non-slip tiles in the market. The Defendant had failed to identify which type of non-slip tiles she had used and the grade of non-slip tiles was used in her restaurant.

1. I therefore find the Plaintiff has successfully proved the Defendant to be negligent and in breach of her duty to warn visitors of the slippery floors in the restaurant and for failing to keep and maintain the property safe and slip-free and for being in breach of section 3 of the Occupiers Liability Ordinance, Cap.314.

Quantum

1. The findings of joint orthopaedic experts the two doctors appointed by the Plaintiff and the Defendant, confirmed the Plaintiff’s account of the accident to be consistent with the injuries. Osteoporosis was detected by the doctors in the bone densitometry performed at the rehabilitation stage. They agreed it was present before the accident. But in Dr Chiang’s view, the Plaintiff’s left wrist would not have fractured but for the accident. The Defendant must take the victim as she finds her, it is the thin skull rule.

1. The doctors found Miss Tang has a mild decrease in the range of movement of the left wrist. They found a mildly prominent ulnar styloid which was contributed by the mild dorsal displacement of the distal radius due to the fracture. The doctors also agreed that Miss Tang suffered from a mild reduction in efficiency relating to the residual complaints of Miss Tang which included persistent on and off pain on the left wrist, numbness and lack of strength and reduced range of movement of the left wrist.

Pain, Suffering, Loss of Amenities

1. The Plaintiff now asked for $250,000 to compensate her pain, suffering and loss of amenities. Mr Luk, counsel for the Plaintiff, relied on a number of authorities including the case of *Ho Bing Cheung v Lam Yin Tuk trading as Ocean Fast Food*, DCPI66/2004, where District Judge C B Chan awarded the plaintiff in that case $220,000 under PSLA. The plaintiff was a 61-year-old man who fell on an oily patch underneath a fast food shop’s exhaust vent. He suffered a fracture of the distal radius and ulnar on the right wrist and mild tenderness to his mid lumbar spinal region.
2. In the case of *Chan Cheuk Yiu v Chan Ho Kwan*, HCPI879/2000, an assessment of damages by Master Mary Yuen on 30 June 2001, where she awarded $145,000 to the 22-year-old plaintiff who suffered a fracture to the distal radius of the right wrist and laceration to her right knee at a traffic accident. The plaintiff’s daily activities were said to be unaffected by the injuries.
3. In the case of *Chung Hok Sung v Li Kam Ming*, HCPI393/1995, Master Chung (as he then was) awarded on 19 May 1997 the 32-year-old plaintiff a sum of $200,000 where the plaintiff suffered fracture to the left ulnar radius, and the disability included the development of tennis elbow and loosening of the distal radioulnar joint.

1. After careful consideration of the Plaintiff’s pain, suffering and loss of amenities at and after the accident, and taking into account the authorities cited to me, I also took into account the discomfort and disability Miss Tang suffered from now including her loss of enjoyment of sporting activities. I consider an award of $200,000 to be an appropriate award under this head.

Loss of Earnings

Pre-trial Loss

1. The Plaintiff though given 6 months of sick leave by the doctors only took 3 months’ leave for she did not wish to be absent during the start of the school term in 2003. She is now asking for one month’s loss of earnings plus the sum of $558.85 as her sick leave pay and the MPF retirement benefits. In total, she asks for $11,735.85. I accept that her claim is reasonable.

Loss of Earning Capacity

1. The Plaintiff is working at the same job she was in at the time of the accident is not claiming loss of future earnings, but she is claiming for a loss of earning capacity because of the injury suffered at the accident. She was 43 years old at the time of the accident. She is now 46 years old. She claimed that she had received complaints because she stopped picking up her kindergarten pupils due to her left wrist had been weakened and was painful whenever she lifted heavy weights. She claimed that this has created a handicap in the labour market.
2. I accept this is a genuine concern. However, I do not agree with Mr Luk that this loss would attract an award of 12 months’ income. She would possibly be required to go through a period of re-training should she lose her present job as a kindergarten teacher. I would therefore give her an award equivalent to 4 months of her present income to compensate the period she will be taking for a re-training programme and for looking for new employment. I believe 4 months should be sufficient for that purpose. With the present monthly salary of $11,900, 4 months come to $47,600.

Future Medical Treatments

1. The Plaintiff asked for the sum of $15,000 under this head. I am satisfied that she would require medical attention from time to time due to the persistent pain and weakness of her left wrist and loss of range of movement. I find the sum of $15,000 to be a reasonable sum.

Special Damages

(i) Medical Expenses of $3,770

1. I find this to be reasonable and justified.

(ii) Travelling Expenses of $4,477.60

1. This, I find to be also reasonably incurred.

(iii) Tonic Food

1. This item was not supported by any receipts or breakdowns. The Plaintiff merely claimed a monthly sum of $2,000 for a period of 2 years. She claimed that her mother had prepared such tonic foods at her request since the accident, and this was on average twice a week. However, she admitted she did not pay her mother any extra sums of money other than her usual monthly contributions that she had been giving to her mother. I find this to be rather extraordinary because her mother is the one who should be compensated for the loss. And as no receipts had been produced and without any medical evidence in support of the use of Chinese medicine or such herbs, I would award the sum of $10,000 to be reimbursed to the Plaintiff’s mother by the Plaintiff.

(iv) Damage Done to Clothing, Personal Articles and Wristwatch

1. I find these to be reasonable and I allow the sum of $1,184 claimed.

Summary

Pain, suffering, loss of amenities: $200,000.00

Pre-trial loss of earnings: $ 11,735.85

Loss of earning capacity: $ 47,600.00

Future medical expenses: $ 15,000.00

Special damages: $ 19,431.60

TOTAL: $293,767.45

Interests

1. Interests on PSLA at 2% per annum from the date of writ to the date of judgment. Interests on special damages at half judgment rate from the date of accident to the date of judgment, thereafter at judgment rate until full payment.

Costs

1. Costs should follow the event and I order costs to be borne by the Defendant to the Plaintiff, to be taxed if not agreed, with certificate for counsel. Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

# (H C Wong)

# District Court Judge

Mr Victor Luk Ying-wah, instructed by Messrs C H Chan & Co., assigned by DLA for the Plaintiff

Mr Chan Shu-yung, of Messrs Raymond Cheung & Chan, for the Defendant