## DCPI 355/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 355 OF 2007

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##### BETWEEN

CHAN KWOK CHU Plaintiff

### and

MORNING SPRING LIMITED trading as Defendant

EDO RESTAURANT (江湖料理)

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Coram : Her Honour Judge Mimmie Chan

Dates of hearing : 26 – 27 November, 2007

Date of handing down Judgment : 20 December, 2007

# JUDGMENT

**Background**

1. Mr. Chan worked as Deputy Manager at the Edo Restaurant operated by his employer, the Defendant. On 23 February 2004, he was working in the Restaurant when he slipped and fell, sustaining back injuries as a result. He claims that he slipped and fell because he was taking some empty trays from the utensils collection area of the Restaurant, and was making his way out to the dining area of the Restaurant, when he stepped on either oil or water on the floor. Mr. Chan claims damages from his employer, claiming that the accident was caused by the negligence or breach of statutory duties (under Cap.314 and Cap. 509) on the part of the employer, its servants or agents. The employer denies that the accident was caused by any negligence on its part, claiming that it had taken all reasonable steps to ensure the safety of Mr. Chan.

**Issues**

1. The issues for determination at trial are:
   1. Did Mr. Chan fall as a result of the slippery floor of the Restaurant?
   2. Was Mr. Chan's fall caused by the employer's negligence?
   3. What are the damages recoverable by Mr. Chan?

**Did Mr. Chan fall as a result of the slippery floor of the Restaurant?**

1. Mr. Chan's evidence is that at about 11:30 a.m. on 23 February 2004, he was carrying over 20 empty trays from the utensils collection area and in the course of taking them out to the dining area of the Restaurant, when he slipped because of some water or oil stain on the floor, and fell. According to Mr. Chan, his duties as Deputy Manager of the Restaurant were very broad, including cleaning up after clients of the Restaurant had finished their meals, taking their dirty utensils and cutlery to the utensils collection area, and taking clean trays from the utensils collection area to the dining area of the Restaurant for use by clients.
2. It is not in dispute between the parties that the utensils collection area of the Restaurant is situated in an area between the office of the Manager and the dining area of the Restaurant. The photographs in the trial bundle show that within the utensils collection area are gray plastic basins and blue plastic buckets, which are placed on racks and on the floor. The blue plastic buckets are for disposal of food and drink leftovers. The gray basins are for collection of dirty utensils and cutlery after customers' use. The gray basins may also contain food remnants and liquid. After the waitresses have cleared the diners' tables, the dirty utensils, cutlery and food leftovers would all be carried into the utensils collection area, and cleared either into the blue buckets or the gray basins. The dirty utensils and cutlery would occasionally be taken by staff to a separate area outside the utensils collection area for washing. The utensils collection area leads to the kitchen on one side of the Manager's office. The kitchen staff pass the utensils collection area on their way to the Manager's office, the dining area and the toilets.

1. The employer's evidence is that there is a mat on the floor of the utensils collection area, the purpose of which is to trap moisture on the mat. The employer claims that a sign is displayed on the wall within the utensils collection area and just outside the Manager's office, which sign reads: "Caution slippery floor". The employer further claims that there is a yellow plastic sign which stands on the floor outside the utensils collection area, and which reads: "Caution". According to the evidence of the employer, a floor mop is placed within the Manager's office just at the entrance, for use in drying any wet floor surface.
2. According to Mr. Chan, whose duties he claims includes the collection of used utensils and their disposal and the supervision of waitresses whose work also includes the collection of used utensils and their disposal, staff of the restaurant would normally dispose of dirty utensils and food leftovers fairly quickly in the utensils collection area, without taking a lot of heed in the process. According to Mr. Chan, the utensils collection area of the Restaurant was generally untidy and dirty, and the floor of the utensils collection area was often damp, sometimes with food remnants as well. He claims that at the time of the accident, the "Caution" signs were absent, there was no mat on the floor as claimed by the employer, nor was there a floor mop in close vicinity within the Manager's office. Mr. Chan's claim is that the floor of the Restaurant would be cleaned shortly after 9 a.m., before it opens for business at 10 a.m. After the lunch hours, the floor would sometimes be cleaned again.
3. According to the evidence of Mr. Chan, he was carrying some empty trays and was walking out of the utensils collection area into the dining area of the Restaurant, when he felt his foot stepping on something slippery, and as a result, he fell forward and landed on the floor on his right hip. He felt acute pain and could not get up. He lay on the floor to rest until the ambulance arrived and he was taken to the hospital.
4. Mr. Chan claims that despite carrying the trays, he had taken a glance at the floor before stepping out from the utilities collection area, but had not detected anything on the floor, until he felt his foot stepping on something slippery, and he fell. He accepted in cross-examination that as he had not actually seen water or oil on the floor, and had only guessed that he must have stepped on either some water or oil stain which was on the floor then.
5. Mr. Ng, the Manager of the Restaurant, gave evidence on behalf of the employer. He denied that Mr. Chan could have slipped because of some water or oil stain on the floor. Counsel for the employer argued that even on Mr. Chan's evidence, he had not actually seen water or oil on the floor, and it was only Mr. Chan's guess that he had stepped on a water stain or an oil stain. According to Mr. Ng's evidence, he had given clear instructions to all the waitresses at the Restaurant that whenever they should see that the floor of the restaurant was wet or slippery, they should immediately dry the floor surface with the floor mop, and the floor mop was usually placed near the utensils collection area, inside the Manager's office. Mr. Ng claims that all the waitresses knew his insistence on keeping the floor dry, and they all followed his instructions. Moreover, Mr. Ng claims that he would regularly inspect the restaurant to ensure that his instructions were duly carried out by the staff.
6. According to Mr. Ng, the mat within the utensils collection area would catch any moisture or water within the utensils collection area. The fact that the utensils collection area was covered by the mat meant that staff of the Restaurant would not carry water stains or oil stains that may be left in the utensils collection area into the dining area of the restaurant, and thus prevent anyone from meeting with an accident caused by slipping on water or oil stains. Mr. Ng's evidence is that there is a spare mat which can replace the mat in the utensils collection area should it become too wet. Mr. Ng also referred to the warning signs in the vicinity of the utensils collection area. Because of all these matters to which Mr. Ng referred, he claims that the Restaurant had never received any complaints from customers or staff as to the floor being made slippery as a result of the presence of water or oil stains.
7. Mr. Ng may well have been telling the truth when he said that he had given instructions to the waitresses in the Restaurant to clean the surface of the floor whenever it was discovered to be wet, or dirty. However, Mr. Ng may be too optimistic in his belief that all the waitresses would in fact always act as he had instructed, to use the floor mop to clean the floor whenever dirt or water was detected within the Restaurant, particularly during busy hours. According to Mr. Chan, the accident occurred at about 11:30 a.m., when breakfast was being served at the Restaurant and when lunch was just beginning. According to the evidence produced by the employer, there were 43 orders placed on the morning in question, between 10 a.m. to 11:30 a.m. The employer claims this was not a particularly busy period, but Mr. Chan claims that it was not quiet either, and on Mr. Chan's evidence, he had himself been in and out of the utensils collection area several times before the accident occurred. It can reasonably be envisaged that other waitresses had done the same. On Mr. Ng's evidence, the floor surface of the Restaurant would be cleaned shortly after 9 a.m., but it would only be after 2 p.m. that the floor would be cleaned again in the usual course.
8. Even looking at the photographs produced by the employer for the purposes of showing the layout of the utensils collection area, the mat there and the warning signs there, the mat and the floor within the utensils collection area can be seen to be stained and dirty. The fact that the floor of the utensils collection area, and the mat placed there, would be dirtied as a result of restaurant staff emptying food remnants and liquid into the blue buckets, and placing dirty utensils into the gray basins, is not only an inherent probability, but more likely than not. The fact that kitchen staff would be passing the area increases the likelihood of water and even food remnants being deposited on the floor or the mat in the utensils collection area, with a risk of such water, liquid or food remnants being carried by foot out into the dining area immediately outside the utensils collection area.
9. Further, when Mr. Lam, the chef, gave evidence on behalf of the employer, he claimed that the yellow "Caution" sign with a stand was normally placed in front of the table just outside the utensils collection area. He explained that this was because this table was also used by staff of the Restaurant to place used utensils after they had been cleared from the dining area. This table is in the vicinity of the location where Mr. Chan had slipped. From Mr. Lam's evidence, the fact that dirty utensils with food remnants or drinks are placed on the table after staff had removed them from diners' tables further increases the risk of spillages and the probability of the presence of water or oil stains on the floor where Mr. Chan had allegedly slipped.
10. Mr. Ng's evidence is that after Mr. Chan had been taken to the hospital, he had inspected the area where Mr. Chan had slipped, but had not detected any water or oil stain on the floor. He also claimed that when Mr. Chan was lying on the floor after his fall, Mr. Ng had looked at the bottom of Mr. Chan's shoes but had not seen any water. I doubt that Mr. Ng would have carefully examined Mr. Chan's shoes. Even if he had not been able to detect any water or other stain at the bottom of Mr. Chan's shoes, it cannot be conclusive of the fact that Mr. Chan had not stepped on something slippery on the floor before his fall. I also accept the submission of counsel for Mr. Chan that between the time of Mr. Chan's fall and the time of Mr. Ng's alleged inspection of the floor after Mr. Chan had been taken to the hospital by ambulance, different people had passed by the area including the attendants from the ambulance, such that Mr. Ng's evidence that at the time of his alleged inspection, there was no sign of any water or other stain on the floor, is unreliable.
11. Mr. Ng also claims that if Mr. Chan had slipped as he was stepping out into the dining area, it was odd that he had fallen with his feet towards the utensils collection area. According to Mr. Chan, he was carrying more than 20 empty trays at the material time, and as he slipped, he fell forward at the same time, landing with his feet pointing towards the utensils collection area. No one witnessed Mr. Chan's fall, but Mr. Ng accepted that he heard a loud "bang" and then discovered that Mr. Chan had fallen. Bearing in mind the medical evidence which suggests that the injuries sustained by Mr. Chan were consistent with the fall he alleged, and in the absence of any other evidence suggesting otherwise, I accept Mr. Chan's evidence in this regard that he had slipped and fallen in the circumstances he described.
12. Considering the evidence, I accept on a balance of probabilities that Mr. Chan had stepped on either water, oil or other liquid on the floor surface of the dining area outside the utensils collection area, or had stepped on water, oil or food remnants within the utensils collection area, and had slipped when he stepped out into the dining area from the utensils collection area.

**Was Mr. Chan's fall caused by the employer's negligence?**

1. The employer claims that it had taken all reasonable and practicable steps to ensure the safety of its employees including Mr. Chan. It claims that it had provided a safe place and system of work, and that it has no duty to provide an accident risk-free place and system. To demonstrate that it had taken all reasonable and practicable steps, the employer relies on the fact that, according to the evidence of Mr. Ng and Mr. Lam, there was a mat within the utensils collection area to trap moisture and to prevent slips, there was a floor mop and Mr. Ng had given instructions to the waitresses to clean the floor with the floor mop immediately upon seeing any wet or slippery substance on the floor, and "caution" signs were displayed within and in the vicinity of the utensils collection area. According to Mr. Ng, about three trolleys were provided in the Restaurant for use by staff to collect and transport utensils and food trays between the dining area and the utensils collection or kitchen area. However, according to Mr. Chan, many things were placed on the trolleys and they were infrequently used. Even from the photographs in the trial bundle provided by the employer, it could be seen that the trolley in the utensils collection area had miscellaneous items placed on it such that staff would not find it convenient to use the trolley for transporting utensils and trays.
2. On Mr. Ng's evidence, Mr. Chan as Deputy Manager did not have to carry food trays from the utensils collection area to the dining area, as the waitresses were supposed to do that. It was only if the waitresses were busy that Mr. Chan was supposed to help with this task. If the Restaurant was very busy, then even Mr. Ng would assist. Mr. Ng maintained that the Restaurant was not busy at the time when the accident occurred. Alternatively, Mr. Ng claimed that Mr. Chan should have used the trolley to transport the food trays, instead of carrying them in his hands which might have contributed to Mr. Chan's accident.
3. It is not in dispute that two days prior to the accident, Mr. Ng had given to Mr. Chan notice of termination of his employment. According to Mr. Chan, he had at the same time been instructed by Mr. Ng that he should carry out the same duties as the other waitresses and that he no longer had authority to ask the waitresses to do such work as carrying the food trays from the utensils collection area to the dining area of the Restaurant. This is denied by Mr. Ng.
4. Leaving aside the question of the "demotion" as alleged by Mr. Chan, it is not in dispute that in times of need, such as when the Restaurant is busy, Mr. Chan and Mr. Ng would assist in clearing tables and collecting food trays. On Mr. Chan's evidence, his duties as Deputy Manager of the Restaurant included the manual tasks of clearing tables and collecting utensils and food trays. I do not consider it to be improbable for Mr. Chan to be involved in these tasks, particularly when the Restaurant is busy or when other waitresses are not readily available. Nor do I consider Mr. Chan to be contributorily negligent in undertaking these tasks.
5. I do not accept the argument that the employer had already taken all reasonable and practicable steps to ensure that the workplace was reasonably safe, or that a safe system of work had been provided. Mr. Ng admits that the system in place was that the floor of the Restaurant would be cleaned before business commenced at 10 a.m.. It was not until after 2 p.m. that the floor of the Restaurant was scheduled to be cleaned again. Mr. Ng claims that the waitresses had been instructed to clean the floor whenever wet or dirty spots were detected, and on Mr. Ng's evidence, there were at least three waitresses in service on the morning in question. However, it can reasonably be foreseen that when the waitresses are busy, particularly during the times when breakfast and lunch are served, the waitresses may not have time to carry out Mr. Ng's instructions to the letter. Mr. Ng admits that other than the waitresses, there was no other designated member of staff whose specific duty was to clean the floor. In my judgment, it is reasonably foreseeable that there are risks of the floor of the Restaurant being dirtied by food and liquid spillage, and that if the floor is not cleaned immediately because the waitresses are too busy to do so or even to detect such spillage, there is a risk of people slipping on the floor.
6. The utensils collection area and its vicinity, including the area near the table immediately outside the utensils collection area, are particularly vulnerable to spillage and dirt, as staff would dispose of dirty utensils, food remnants and drinks there. It is also the area where kitchen staff pass regularly to collect the gray plastic basins from the Manager's office and to go to the toilet. Staff would also collect the blue buckets and the gray basins from the utensils collection area to the cleaning area. It can be reasonably foreseeable that food remnants, moisture and dirt may be collected in this area and may easily be carried from this area to other areas of the Restaurant in the vicinity, such as the location where Mr. Chan had slipped and fallen. In failing to devise a system whereby the utensils collection area and its vicinity are more regularly cleaned by a designated member of staff, the employer had fallen short of its duty of taking all reasonable care, and of ensuring that the Restaurant is safe for its staff, so far as reasonably practicable.
7. I do not accept the submission made by counsel for the employer that to require the employer to carry out more regular cleaning than as required under its current system in place is to place an absolute duty on the Restaurant to ensure the safety of Mr. Chan and other members of the Restaurant's staff or customers, or is otherwise not feasible or reasonably practicable. Mr. Ng can simply organize the work system of the Restaurant better by having at least one employee designated with the task of cleaning the floor and/or cleaning the utensils collection area, or have a system in place for the floor of the Restaurant to be cleaned more regularly between the hours of 9:30 a.m. and 2 p.m. It can be reasonably envisaged that this would be a busy period. To rely on the waitresses to clean the floor only when dirt or spillage is detected, in addition to their other duties of serving customers and clearing tables, is not sufficient particularly when manpower is short or the Restaurant is busy.
8. I have already found that Mr. Chan had fallen as a result of his stepping on a water stain or oil stain or other food remnant on the floor of the Restaurant. In my judgment, this was as a result of the employer's negligence in failing to take all reasonable and practicable steps to ensure the safety of its employees, including Mr. Chan, and in failing to provide a safe place and system of work.
9. On the evidence, I do not accept that Mr. Chan was negligent in failing to detect the water, oil or food remnant that he had stepped on. Adopting the approach of Cheung, J in the case of *林灼良 訴 毅利華有限公司及其他人* [2004] 1 HKLRD 778, where the defendant's breach of statutory duty resulted in the plaintiff's not being able to adopt a safe method to carry out his work, the court would not easily hold that the plaintiff was contributorily negligent in adopting an unsafe method that he had in effect been forced to adopt. If the fact of Mr. Chan's carrying over 20 empty food trays at the material time had contributed in any way to his fall, I do not accept such contribution to be more than nominal.

**What are the damages recoverable by Mr. Chan?**

1. Mr. Chan was 43 years old at the time of the accident, and is 47 years old now. The hospital records show that there was no fracture of his right shoulder, pelvis and spine. The clinical diagnosis was back injury. He was found to have tenderness over the lumber spine, and received physiotherapy and occupational therapy for his injury. Clinical examination on 7 July 2005 showed diffuse tenderness of Mr. Chan's lower back and right buttock, with stiffness of the spine, diminished sensation and power of the right lower limb and diminished right ankle reflex. When examined by his own orthopedic expert on 19 July 2006, Mr. Chan was diagnosed with a sprained back with likely prolapsed intervertebral disc. The doctor opined that Mr. Chan had a fair recovery but his back pain was likely to be permanent. According to be orthopedic expect appointed by the employer, Mr. Chan had sustained a sprained back injury which was compatible with the circumstances of the accident, and which caused soft tissue injury to his back. The employer's expert was of the opinion that Mr. Chan might suffer from slight residual back pain in the coming years.
2. Mr. Chan was given a total of 782 days of sick leave from 23 February 2004 to 14 April 2006.
3. Mr. Chan's orthopedic expert was of the opinion that Mr. Chan would have reduced working efficiency if he were to return to more manual work, standing for prolonged hours or cleaning and tidying up utensils. He assessed Mr. Chan to have a 5% impairment of the whole person and 5% loss of earning capacity. According to the employer's orthopedic expert, Mr. Chan should be able to work as an assistant manager in a restaurant, but was recommended to take short breaks after prolonged period of standing and to avoid heavy lifting during work.

***Pain suffering and loss of amenities***

1. On the evidence, I do not consider that Mr. Chan's injuries are serious. No painful surgical procedure was required. After considering *Yeung Sze v. Win Art Design & Decoration Company Ltd.* HCPI 6/2000, 27 June 2001 and *Lai Wai Tan Peter v. Secretary for Justice acting for* *Hong Kong Police Force* DCPI 1469/2006 9 October 2007, I will allow an award of $120,000.

***Pretrial loss of earnings & MPF***

1. It is not in dispute that Mr. Chan was earning $9,000 a month before the accident. His 782 days' sick leave was endorsed in Form 7. I will allow his loss of earnings at $234,000 ($9,000 x 26 months), and Mandatory Provident Fund benefits of $11,700 ($234,000 x 5%) for the period of his sick leave.

***Special damages***

1. Mr. Chan's claim for medical expenses is agreed at $4,465. His claim for $5,000 as tonic food expenses incurred is unsupported by any documentary evidence. I will only allow a reasonable figure of $1,000.

***Loss of earning capacity***

1. On the evidence, I am not satisfied that there is a substantial or real risk that Mr. Chan might lose his current job, or that he will suffer disadvantage in the labour market by reason of his injury. I will not make any award under this head.

**Award**

1. The award for damages includes :
   1. PSLA $120,000
   2. Pre-trial loss of earnings & MPF $245,700
   3. Special damages $ 5,465

Less : Employees compensation payment $196,505

Total : $174,660

1. I will award interest on the award of PSLA at the rate of 2% per annual from the date of the writ to the date of judgment, and on the award of special damages at half the judgment rate from the date of the accident to the date of judgment.

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

(Mimmie Chan)

District Judge

*Mr. Joeson Wong, instructed by Au Yeung, Cheng, Ho & Tin for the Plaintiff*

*Mr. Victor C. F. Cheung, instructed by Li,Kwok & Law for the Defendant*