## DCPI 893/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 893 OF 2008

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##### BETWEEN

CHAU PAK FEI (周柏飛) Plaintiff

### and

ALL MEMBERS OF BOARD OF DIRECTORS Defendant

(including but not limited to the Chairman

Mr. Ma Wai Lee Bartholomew, The Treasurer

Mr. Kong Chung Kwong, Christopher B. and The Secretary

Dr. Leung Cho Bun) of HONG KONG SHENG KUNG HUI

LADY MACLEHOSE CENTRE, sued on behalf

of themselves and on behalf of all members of

HONG KONG SHENG KUNG HUI LADY MACLEHOSE

CENTRE, an unincorporated association

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 22 - 23 September, 2008

Date of handing down Judgment : 3 November, 2008

# JUDGMENT

**Background**

1. Mr. Chau worked as a chef at a restaurant operated by the Defendants ("**Restaurant**"). In the morning of 6 May 2004, Mr. Chau had an accident in the kitchen of the Restaurant, as a result of which he sustained an injury to his back. He now claims damages as a result, in the sum of $197,297.50.
2. According to Mr. Chau, he had to lift and carry a large container of meat sauce from a low stove in the kitchen designed for cooking soup or sauce to, first one frying stove, and then another stove, in the course of which he slipped on the floor. Mr. Chau said that he lost his balance as a result, and although he did not fall, he sprained his back and immediately experienced slight pain. He was able to continue his work in the kitchen, but shortly afterwards, as he was bending down to pick up some corn which he was cutting and which had fallen on the floor, he experienced excruciating pain in his back, such that he could not get up and had to remain squatting on the floor for about 8 minutes before he could slowly stand up. An ambulance was called and he was admitted to the emergency section of Princess Margaret Hospital shortly after noon on 6 May 2004.
3. Mr. Chau claims that the accident was caused by the negligence, breach of statutory duties (under Cap. 59, Cap. 509 and Cap. 314), or breach of the contract of employment on the part of the Defendants, their servants or agents. The Defendants deny that the accident was caused by any negligence or breach on their part, claiming that they had taken all reasonable steps to ensure the safety of Mr. Chau.

**Issues**

1. The issues for determination at trial are:
   1. Did Mr. Chau sustain injury in the manner he described?
   2. Was Mr. Chau's injury caused by the Defendants’ negligence or breach of duty?
   3. What are the damages recoverable by Mr. Chau?

**Did Mr. Chau sustain injury in the manner he described?**

1. According to Mr. Chau, he started work in the kitchen shortly before 9 a.m.. He had to make the soup and prepare the food required for lunch to be served by 11:30 a.m.. It is not disputed that the Restaurant served set meals for school children and for the elderly who were members or entitled to use the facilities of the Maclehose Centre ("**Centre**"). The menu for these set meals were fixed about one month in advance. The Restaurant also served "walk-in" clients provided that they paid a membership fee with their meal. There was a separate menu for these "walk-in" clients.
2. Mr. Chau's evidence is that on the morning in question, he had taken out from the refrigerator a large saucepan of meat sauce which he had made the day before. His intention was to heat up the partly cooked sauce. He placed the saucepan first on the kitchen counter, and then on a low electric cooking stove designed for cooking soup or sauces. According to Mr. Chau, this electric cooking stove had not been functioning properly for over a week, and after about five minutes’ cooking on the stove, Mr. Chau discovered that the stove was not working. He therefore had to lift the large saucepan from the low cooking stove to another stove on a slightly higher level. This was a stove generally used for stir frying. After he had so moved the saucepan to the frying stove, Mr. Chau then discovered that even this frying stove did not function. He therefore had to lift the saucepan again from the first frying stove to another one on the same counter, but further to the right. In the process of moving the saucepan of meat sauce from the first frying stove to the second frying stove, his foot slipped on the wet and slippery floor surface, causing him to lose his balance and fall slightly forward with his two hands still holding on to the large saucepan. He experienced slight pain in his back in the process.
3. Mr. Chau said that he continued with his work in the kitchen, and was in the process of cutting vegetables for the soup, when a piece of corn which he was cutting fell onto the floor. It was when he bent to pick it up, that he felt great pain in his back.
4. Mr. Chau was extensively cross-examined as to his account of the circumstances in which the accident allegedly took place. It was put to him that there was nothing in the set menu for school children for the month of May 2004 which required meat sauce to be cooked, and that Spaghetti Bolognese was not on any other menu, as Mr. Chau claimed. Mr. Chau had claimed in his Statements filed in these proceedings that the saucepan containing the meat sauce was heavy and weighed about 50 pounds, for serving approximately 80 to 100 people. The Defendants claim that even if meat sauce had to be cooked , the clientele of the Restaurant was such that it was unnecessary to make the large quantity of meat sauce claimed by Mr. Chau. The Defendants claim that there were only 52 elderly members to be served at the Restaurant on 6 May 2004, requiring a quantity which would weigh less than 37 pounds inclusive of the weight of the saucepan. In any event, it is the Defendants’ case that meat sauce was not a healthy diet for the elderly and would not be served to the elderly members of the Centre at all. The Defendants further claim that there was no record either of any complaint having been made that the electric stoves had malfunctioned, or any repairs having been made to the electric stoves in April or May 2004.
5. Mr. Chau may have exaggerated the weight of the saucepan which he was carrying on the day in question, and I also accept Mr. Chau's explanation that the descriptions of the size of the saucepan and its total weight, as given in his Statements, were estimates only. He accepts that the weight of the saucepan of meat sauce which he had to carry was between 30 to 40 pounds. I do not regard any inconsistency or error in Mr. Chau's descriptions of the saucepan and its weight as destroying Mr. Chau's credibility.
6. I have given careful thought to Mr. Chau's evidence as to the meat sauce which he said he was cooking on the day of the accident. He maintains that although meat sauce was not on the set menu for school children on 6 May 2004, Spaghetti Bolognese was a regular item for walk-in clients of the Restaurant, and he would make the meat sauce 2 to 3 times a week. Mr. Chau also pointed out that the set menu for school children included spaghetti with ham and meat sauce for 8 May 2004, for which 57 orders had to be provided. Mr. Chau claims that he would prepare the meat sauce 1 to 3 days in advance, depending on his work arrangements.
7. Mr. Leung, the Defendants’ Operation Manager, denies that Mr. Chau would have to prepare the meat sauce required for the school children's meals on 8 May 2004 as early as 6 May 2004. The reason he gave was that there would not be sufficient storage space in the refrigerator should the food be prepared in advance. Mr. Leung claims that he was the person who would decide when the meat sauce required for 8 May 2004 would be made, and he considered that, in the ordinary course, the meat sauce would only be prepared on 7 May 2004, and not on 6 May 2004 as Mr. Chau alleges. Mr. Leung used to be a chef, but he was promoted to the post of Operation Manager of the Restaurant in 2003. Mr. Chau had been employed by the Defendant as chef since 1997, and commenced to work in the Restaurant since 2004. It is unbelievable and inherently improbable that Mr. Chau would not have been able or trusted to decide when to cook and prepare his dishes in the ordinary course of his work. According to Mr. Chau, the meat sauce would be partly cooked in advance, with flour and seasoning to be added on the day, before use. In his first Statement, Mr. Chau had said that he had taken the sauce from the refrigerator to be heated up. It is also Mr. Chau's evidence that he had to make more meat sauce to cater for walk-in clients before 8 May 2004. Considering the evidence adduced by Mr. Chau and by the Defendant in its entirety, I accept that what Mr. Chau says in relation to the preparation of the meat sauce on 6 May 2004 is credible.
8. I also accept Mr. Chau's evidence that in the course of his moving the saucepan of meat sauce from one frying stove to the other, his foot had slipped on the wet floor, causing him to sprain his back. When he bent down later to pick up the corn which had fallen onto the floor, this contributed to the injury and caused the excruciating pain of which he complained. I do not accept that the fact of there being no record of maintenance or repair made to the cooking stoves in question between February 2004 and May 2004 is evidence that there was no malfunction of the stoves, of the type complained of by Mr. Chau, and which caused him to move the saucepan from one stove to another. Mr. Chau's complaint was that the electric stoves or the indicating lamp had worked "on and off". In any event, I accept that the accident or injury was caused by Mr. Chau slipping as he was holding a somewhat heavy saucepan of cooked or semi-cooked food with both hands.
9. When he was at the Accident and Emergency Department of Princess Margaret Hospital, Mr. Chau complained to the attending doctor of experiencing back pain after he had tried to pick up something from the floor. I do not find this to contradict Mr. Chau's case, since he had obviously related to the doctor the most immediate event leading to his experience of pain.

**Was Mr. Chau's injury caused by the Defendants’ negligence or breach of duty?**

1. It is not disputed that Mr. Chau's causes of action involve the same standard, i.e. to take reasonable care. The applicable principles are as outlined in *Ward v. Tesco Stores Ltd.* [1976] 1 WLR 810, 815 and applied by Sakhrani J in the case of *So Wang Chun v. Rainforce Ltd. & Others* HCPI 64 of 2006:

"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."

1. I have found that Mr. Chau has shown that the event which is unusual and which has occurred is his foot slipping on the floor when he was standing in front of the cooking stoves and holding the heavy saucepan. Has Mr. Chau shown that the occurrence of such an event is more consistent with fault on the part of the Defendant than the absence of fault?
2. I accept that on the evidence produced, it is more probable than not that Mr. Chau would not have slipped if the floor was dry, clean and free of oil. Mr. Chau accepts that he was wearing waterproof shoes on the day in question. However, from the photographs adduced at the hearing, the location where the accident took place was not far from the area where the kitchen staff defrosted frozen meat placed in buckets on the floor under a tap or hose. Mr. Chau and Mr. Leung admit that in the morning, frozen meat would be put into a bucket of water and placed on the floor under the tap or hose, with water running continuously into the bucket of frozen meat. According to Mr. Chau, this would continue for about 30 minutes for each bucket, and there were more than one buckets of meat to be defrosted.
3. According to Mr. Leung, there were only 1 to 2 buckets of frozen meat to be defrosted at the same time, but the whole process would last 3 hours. According to Mr. Leung, the defrosting work would only commence after 11 a.m.. He agrees that the area under the tap or hose was wet, but claims that although the constant flow of water into the buckets of defrosting meat means that the water may flow to areas under the low stove, it would not extend further. His explanation was that the floor in the kitchen was covered with non-slip tiles, and any water on the floor would flow to the drains which ran down the length of the kitchen from the area where the tap or hose was situated and where the defrosting took place. Mr. Leung also claims that the water created in the defrosting process would not be oily.
4. I am not at all impressed by the process by which defrosting of frozen meat was done in the kitchen, and find Mr. Leung's evidence in relation to the floor not being wet and slippery hard to believe. Even on the evidence of Madam Law Yiu Wah, the Service Coordination Supervisor who was called by the Defendants, the kitchen floor was wet on the few occasions that she visited, and these were during times when the kitchen was not even busy. According to Madam Law, she could notice that the floor was wet and slippery, and she was always apprehensive whenever she entered the kitchen, and would take care to ensure that she would not slip and fall. She also said that there would inevitably be oil stains on the floor, and explained that she was particularly careful because she was not wearing waterproof shoes like the kitchen staff were told to do.
5. On Mr. Leung's evidence, the kitchen floor would only be washed and cleaned by the kitchen staff (including the chefs like Mr. Chau) after work each day, at around 5 p.m.. According to Mr. Leung's Statement, the accident occurred between 11:30 a.m. and 11:55 a.m.. It is not in dispute that lunch was served at around 11:30 a.m., and according to Mr. Chau, the kitchen would be busy commencing from 9 a.m. when breakfast would he made and food preparation for lunch would commence. Even on Mr. Leung's evidence, defrosting work had begun. It can reasonably be envisaged that as the accident occurred at a busy time of the day, the floor under and in front of the stoves and near the area where defrosting was done would be wet and slippery from the overflow of or spillage from the defrosting water, and otherwise from kitchen staff carrying the water or oil stains from the defrosting area and the water path along the hose and the drain to other parts of the kitchen. I am not satisfied that the floor tiles and the waterproof shoes worn by Mr. Chau would remove entirely the risk of slippage.
6. In permitting the defrosting to be done in the manner described by Mr. Chau and Mr. Leung, and in permitting the kitchen floor only to be cleaned at the end of the working day, the Defendants failed to provide a safe place or system of work, and are negligent and in breach of their duty to take reasonable care to ensure Mr. Chau’s safety. It will not impose an unreasonable or impracticable standard on the Defendants as employer to require the Defendants to devise and implement a safer system of defrosting frozen meat, such as defrosting such meat in one of the sinks in the kitchen of the Restaurant, or changing the water in the bucket frequently as opposed to permitting a continuous flow of water running into, and out of, the bucket on the floor.
7. Counsel for Mr. Chau also argued that the Defendants had failed to give adequate safety training or guidance to Mr. Chau. In this regard, I agree with Counsel for the Defendants that the Defendants are not negligent. Mr. Chau is an experienced chef. His work duties were inherently uncomplicated and required no special skill or instruction. I do not agree that it would be necessary for the Defendants to instruct him on how to lift a saucepan, albeit a heavy saucepan, from one stove to another. He could freely decide how much he could lift and carry. He could have transferred part of the meat sauce to another saucepan or container before lifting and carrying the original saucepan from one stove to the other. Alternatively, he could have solicited help from another colleague to move the saucepan if it was too heavy. There is no evidence that he was under any particular pressure of time.
8. On the same note, I do not accept that Mr. Chau was contributorily negligent. Accepting the Defendants’ evidence that it was well within a chef's competence to lift a saucepan weighing 37 pounds, I do not regard Mr. Chau to be negligent in undertaking what he had done, namely lifting the saucepan from the low stove to one frying stove, and then the other. If the floor had not been slippery, the accident would not have happened.

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

1. The only item of damages claimed by Mr. Chau which is disputed by the Defendants is his claim for loss of earning capacity.
2. On the evidence, Mr. Chau was able to return to work at the Centre in October 2004, after 5 months' sick leave. Because of his injury, he was assigned light duties, until his employment was terminated on 23 December 2005. From 14 March 2006 to 25 April 2006, Mr. Chau worked as a driver, but he said that with his back pain, he could not tolerate the job as it required a long period of sitting. In May 2006, he worked for 3 days at a fast food restaurant, but could not put up with the busy work. From 6 June 2006 to 23 October 2006, Mr. Chau worked as a chef in a home for the aged, but again could not deal with the volume of work because of his injury. From 1 November 2006, Mr. Chau has been working as a chef in the restaurant of another service centre.
3. Mr. Chau claims that as a Chinese chef, he suffers from a significant handicap by reason of the fact that as a result of his injury, he was not able to use a Chinese wok efficiently. This is apparent from the evidence in relation to the time when he resumed work at the Centre after his injury in 2004. However, according to the joint medical report of Dr. Lung and Dr. Yip who examined Mr. Chau on 18 July 2007, Mr. Chau's cervical spine, thoracic spine, upper limbs and lower limbs were all normal. He was able to walk normally without any abnormal posture when standing or sitting, and he was noted to have sat comfortably throughout the assessment. He was diagnosed as suffering from soft tissue sprain of the lumbar spine region. Dr. Yip considered that Mr. Chau's prognosis was excellent, with no abnormality detected in the flexion and extension range of the back. Dr. Yip considered that Mr. Chau's remnant complaints were merely subjective. Both doctors agreed that Mr. Chau could resume work as a cook, Dr. Lung noting that Mr. Chau was coping well as a cook in a less demanding working environment, and had maintained his employment for over 6 months.
4. There is no evidence from Mr. Chau that there is any substantial or real risk that he might lose his current job. He only claims that he can tolerate his current job which does not require lifting of any heavy cooking utensils, but is afraid that his work performance might be affected by his back injury, and that he might lose his job which is on yearly contract. I do not accept that by reason of his back injury, he suffers disadvantage in the labor market to the extent that he is entitled to have 12 months' loss of earnings as compensation for his loss of earning capacity. In all the circumstances, I will only award him a sum of $37,500, representing approximately 3 months' income.

**Award**

1. The total award for damages, including the agreed items, is :
   1. PSLA $120,000
   2. Pre-trial loss of earnings $ 66,950
   3. Pre-trial loss of MPF $ 3,347.50
   4. Loss of earning capacity $ 37,500

$227,797.50

Less : Employees compensation payment $ 97,441.47

**Total :** **$130,356.03**

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 Defendants to Mr. Chau, with certificate for counsel, to be taxed if not agreed on the District Court scale. Mr. Chau’s own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Mr. Cheung Yiu Leung, instructed by Messrs. Leung, Tam & Wong (assigned by D.L.A.) for the Plaintiff*

*Mr. C. K. Wong, instructed by Messrs. Deacons for the Defendant*