DCPI 1470/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1470 OF 2007

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BETWEEN

##### LEUNG SZE NOK, a minor Plaintiff

by her next friend LEUNG YUEN FAT

##### and

##### TSUEN WAN PROPERTIES LIMITED Defendant

trading as RIVIERA ICE CHALET

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Coram : Her Honour Judge H.C. Wong in Court

Dates of Hearing : 25 – 29 January 2010, 12 March 2010,

15 – 16 March 2010 and 27 April 2010

Date of Handing Down Judgment : 20 July 2010

**JUDGMENT**

1. This case involves an unfortunate accident during an ice-skating lesson of the minor Plaintiff Leung Sze Nok (hereinafter referred as “Sze Nok) on Saturday 4 February 2006.
2. The Defendant, Tsuen Wan properties Limited trading as Riviera Ice Chalet occupied and operated an ice skating rink and ice skating school at 3/F, Riviera Plaza, 28 Wing Shun Street, Tsuen Wan (hereinafter referring to as “the School”).

Background

1. At about 9 a.m. on Saturday 4 February 2006 Sze Nok was taking a private ice skating lesson under the supervision of her coach Miss Samantha Ho Shum Yee (hereinafter referred to as “Samantha”). Samantha was an employee of the School. The 4 February 2006 lesson was Sze Nok’s 12th lesson on figure skating with Samantha. Just before the accident, Samantha was demonstrating a set of manoeuvres known as the “right leg forward arabesque” to Sze Nok, Sze Nok was expected to follow and copy the movements. “Forward Arabesque”, also known as “the Spiral”, is described as a gliding forward movement on one leg, leaning the upper body forward, arching the back and raising the free leg backward extending it high in the air.
2. While demonstrating the right leg forward arabesque at the lesson, Samantha suddenly heard Sze Nok cried out behind her. She turned and found Sze Nok kneeling on the ice holding her abdomen with both hands. A male instructor, Vincent Yau Wing Shing (hereinafter referred to as “Vincent”) went over to Sze Nok and carried her off to the skate changing area outside the ice rink. Sze Nok was found to be bleeding on the top left side of her head. The ambulance was called, it took Sze Nok to Yan Chai Hospital for treatment.
3. Hospital record showed when Sze Nok arrived at Yan Chai Hospital at 9:43 a.m. she was conscious and alert with no neurological deficit on admission. A small 2 cm laceration was found over the left parietal region of the skull, X rays showed a 3 cm depressed skull fracture over the same site with contusion. Photographs of Sze Nok’s head taken after the surgery indicated the injury was on the left centre top of her head. Sze Nok was transferred to the Princess Margaret Hospital after medical staff at the Yan Chai Hospital stopped the bleeding on Sze Nok’s head. She was admitted into the neurosurgical unit of Princess Margaret Hospital on the same day.
4. The medical notes from Princess Margaret Hospital recorded that Sze Nok had sustained an open depressed fracture of the left parietal bone with formation of a collection of blood (extradural haematoma) under the skull. It was a mild contusion of the underlying brain. Emergency craniotomy was performed to evacuate the blood clot and repair the bone. The contused area did not require surgical removal. There were fractured bone ends jutting and piercing into the dura (outer membrane covering of the brain) causing a 1 cm long dural tear with the cortex (outer layer of the brain) with one vein exposed. After the bone fragments were removed and the dura repaired, the wound was sutured.
5. After the operation, Sze Nok remained in the intensive care unit for 3 days, she spent 6 more days in the general ward before she was discharged home. Although the surgical scars were large and unsightly, she was able to walk unaided on the day of her discharge. After a month’s rest at home, Sze Nok returned to school. Even though her average marks dropped below 80% for the first time immediately following her injury, she gradually regained her previous performance level, she made a complete recovery and stayed in a band I class. Her scar over the fracture site is permanent but fortunately it is covered by surrounding hair. There is an increase risk of post-traumatic epilepsy in future, the accumulated lifetime risk is 3.9%, but at present she has no residual disability. Both parties agreed the quantum of damages to be $160,000.00 inclusive of interest at the start of the trial. The only matter remained for the Court to decide is the issue of liability.

Issues on Liability

1. According to Mr. Li, Counsel for the Defendant, in order for Sze Nok to succeed in this case she has to prove on a balance of probabilities that:
   1. the accident happened as she alleged; and
   2. the Defendant breached its duty of care under the common law and/or the Occupiers Liability Ordinance (Cap 314)(“OLO”)
2. Mr. Li argued that:
   1. Sze Nok has failed to prove how the accident happened;
   2. even if Sze Nok has established her case, she has failed to prove that the School has breached its duty of care that caused the accident;
   3. the School is not liable for the accident on the ground of volenti non fit injuria;
   4. if the School is held liable, Sze Nok was guilty of contributory negligent.

How did the accident happened?

1. The Plaintiff alleged the accident was caused by the School and/or its servants for:
   1. failing to take any or any reasonable care to see that Sze Nok was reasonably safe as a student of the School;
   2. instructing Sze Nok to follow behind Samantha in a manoeuvre which Samantha knew or ought to have known would expose Sze Nok to risk of injury by Samantha’s raised leg-skate descending from a flip up;
   3. failing to ensure that there was sufficient distance at all times between herself and Sze Nok to prevent the injury;
   4. failing to provide and/or carry out any or any adequate or effective reasonable supervision and care of Sze Nok during the lesson;
   5. allowing the lesson to be conducted in an unsafe manner;
   6. exposing Sze Nok to a risk of injury of which the Defendant knew or ought to have known;
   7. failing to advise and ensure Sze Nok’s head would be protected by helmet.
2. The School’s defence is as follows:
   1. the ice surface of the ice rink at the time of the accident was even and smooth;
   2. while performing left leg forward arabesque at the time of the accident, Sze Nok caused the toe pick to strike the ice surface, thereby causing herself to halt suddenly, lose balance and fall to the front;
   3. at the time of the accident, the distance between Sze Nok and Samantha was more than 3 metres;
   4. Samantha’s skate blade did not, and could not have hit Sze Nok;
   5. it was not necessary for Sze Nok to wear a safety helmet in the light of:
      1. the crucial requirement of balancing in freestyle ice skating;
      2. its obstruction to the skater’s vision; and
      3. the minimal risk of head injury in practicing freestyle ice skating.

The Burden of Proof

1. According to the authors of Clerk & Lindsell on Torts 19th edition, paragraph 8-149:

“The onus of proof, on the balance of probabilities, that the defendant has been careless falls upon the claimant. If the claimant’s evidence is equally consistent with the presence or absence of negligence in the defendant, his action will fail.”

1. In paragraph 8-150, the learned authors stated:

“the question in every case is, what is the reasonable inference for unknown facts? ……… Courts approach matters of inference on the common sense basis and where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence might be required from the claimant to establish a prima facie case which it will then be for the defendant to rebut.”

1. In Snell v. Farrell (1990) 72 DLR (4th) 289, Sopinka J. stressed that:

“The judge as a trier of fact, is entitled to draw inferences from the evidence and does not have to approach issues from the narrow view point of an expert witness. Hence, he was entitled to take into account the fact that in many medical negligent cases the facts would lie particularly within the knowledge of the defendant and in these circumstances little affirmative evidence on the part of the claimant would justify drawing an inference of causation in the absence of evidence to the contrary. Although these comments were made in the context of proof of causation, it is suggested that there are equally applicable to proof of negligence.”

Res ipsa loquitur

1. The Court may in some circumstances infer carelessness on the part of the defendant where the claimant can show the nature of the accident suggests both negligence and the defendant’s responsibility. Drawing the inference in such a circumstance is often described as an application of the doctrine of res ipsa loquitur.

“The doctrine which stems from the judgment of Erle C.J. in *Scott v London and St. Katherine Docks*, applies where (1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant’s negligence must be determined on that evidence.”

(paragraph 8-152 Clerk & Lindsell on Torts page 497)

1. In paragraph 8-155 the authors of Clerk & Lindsell on Torts said:

“**Procedural effect of doctrine** One view of the effect of the doctrine is that it simply raises an inference of negligence which requires the defendant to provide a reasonable explanation of how the accident could have occurred without his negligence. On this view, the defendant does not have to prove on the balance of probabilities that his explanation is the correct one. If it is equally as plausible as that of the claimant, the claimant will fail as he bears the burden of proof. ………….. Thus if the defendant provides an equally plausible explanation, this will redress the balance of probability, if it has tilted against him, and the claimant will be back where he started, namely, of having to establish his case by positive evidence.”

1. In the Privy Council decision of Ng Chun Pui v Lee Chuen Tat [1988] 2 HKLR 425, the Privy Council held at page 427 H to I:

“Resort to the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as the resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.”

1. In the present case, there were no eyewitnesses to the accident. Mr. Li, Counsel for the School, suggested the theoretical possibility of Sze Nok’s toe pick hitting the ice surface causing her to fall to the front and she accidentally hit her own head. As to how the injury which was a dent and a pointed fracture in the left centre of the crown of Sze Nok’s head could have been caused, Samantha and Mr. Gomes suggested that when Sze Nok lost balance, her legs could have flipped backwards and hit her own head with the pointed top of the blade of one of her skates. In Court, Samantha claimed that Sze Nok had the flexibility of 5% of the population, therefore, it would not be surprising for her to be able to hit her own head with her own skates as she fell forward.
2. The suggestion was countered by the evidence from Sze Nok’s mother who said in Court that she had consulted Sze Lok’s then ballet teacher, Sze Lok was not a child with particularly flexible limbs.
3. Sze Lok was heard crying out in pain by Vincent who was coaching another boy at the ice rink at the time, Sze Nok was seen lying with her face down on the ice with her two hands holding her stomach and kneeling with her knees on the ice. Sze Nok herself only remembered experiencing pain in the abdomen and falling to her knees. No one else saw how the accident happened. Sze Nok’s domestic helper Miss Canillo who was in the vicinity outside the ice rink did not witness the accident. She claimed she had examined Sze Nok’s ice skates after they were removed from Sze Nok at the changing area, she found no evidence of blood or hair on the blades of Sze Nok’s skating boots.
4. Mr. Leung Hok Cheung, the parent of a student at the School, was present outside the ice rink, did not witness the accident. He said he heard a noise which drew his attention to the ice rink, he saw Sze Nok lying face down on the ice surface, her coach Samantha was not close to where Sze Nok was. It is not disputed that a patch of blood was found on the ice surface after the accident and it is believed that the blood belonged to Sze Nok who was bleeding from the head after the accident.
5. In spite of Mr. Leung Yuen Fat’s (Sze Nok’s father) efforts trying to ascertain the cause of the accident, no-one was able to give him an answer and he could not find anyone who witnessed the accident. He and his wife Madam Chan tried unsuccessfully to obtain a taped record of the video cameras from the CCTV installed at a few locations around the ice rink. He and Madam Chan were skeptical of the explanations given by Mr. Gomes, the ice rink manager and head coach, or the Riviera Plaza building management staff.
6. At the Court’s site visit to the ice rink, the Court was shown the security room with a monitor depicting views from CCTV cameras at different areas of the Riviera Plaza including the ice rink and the School. It was apparent that not all CCTV cameras were installed with recording tapes; furthermore, the guard at the security office would only be able to see views of some of the 16 CCTV cameras at any given time because the monitor at the security office on the date of the accident showed only views from 9 CCTV cameras in sequence, every few minutes views on the monitor at the security office would change to show views from different CCTV cameras installed at the Plaza. Therefore, it is quite possible at the time of the accident, even if someone was sitting in front of the monitor at the security guard room, he would not have witnessed what happened even though one of the 16 CCTV cameras was monitoring the ice rink. As no tape had ever been installed in the particular CCTV camera pointing at the ice rink, there was no recording of the accident. Consequently, one has to rely on the surrounding circumstantial evidence to determine what happened at the time of the accident.
7. The School did not dispute that as a general principle an ice skating school and occupier of the ice rink, the School owes a duty to take reasonable care to see that a student like Sze Nok would be reasonably safe while taking an ice skating lesson at the School. It is Vincent and Samantha’s evidence that the ice surface of the ice rink at the material time was smooth and even. According to Mr. Gomes, the ice surface would be smoothened several times a day with the smoothing machine at the ice rink. There was no evidence there were any bumps on the surface of the ice on the morning of the accident.
8. The School also accepted that a student like Sze Nok would be exposed to risks of injury should she come in contact with Samantha’s raised leg if she was skating too closely behind Samantha while performing the forward arabesque manoeuvres. However, the School’s position was Samantha was 3 metres ahead of Sze Nok when she performed the forward arabesque manoeuvres. It is not in dispute that Samantha is an experienced ice skater and a professional coach with many years of teaching experience. She claimed she would from time to time watch the manoeuvres of her students from the reflective screen installed at the inside rim of the ice rink. She admitted she would not turn around to watch her students, as she could see them from the reflective screen on the inside rim of the ice rink.
9. It was Samantha’s evidence that Sze Nok had learnt the forward arabesque manoeuvres sometime before the accident for the forward arabesque was required in the level 2 figure skating examination. Samantha claimed Sze Nok was not strong on her strokes and she had told Sze Nok to improve on her strength of movements at the 12th lesson. Furthermore, at previous skating lessons Sze Nok had practiced the forward arabesque with Samantha.
10. It is the Plaintiff’s case that the cause of accident was the close proximity between Samantha and Sze Nok. Though Samantha insisted she had maintained a distance of 3 metres between herself and Sze Nok that morning while performing the forward arabesque manoeuvres, Sze Nok claimed she was only 1 metre away from Samantha before the accident. If Sze Nok is correct, there are doubts as to whether Samantha did maintain a safe distance between herself and Sze Nok when she was demonstrating the manoeuvres to her student. Samantha described in Court she was gliding at medium slow speed in front of Sze Nok and was at least 2 to 3 metres from her. She heard a ‘pop’ sound and heard Sze Nok yelling ‘哎呀’. At this juncture, Samantha had not yet completed the forward arabesque manoeuvres, her right leg was still raised behind her. On hearing the ‘pop’ sound, Vincent turned and saw Sze Nok had fallen on the ice, he called out to Samantha who was gliding behind him on his right. Samantha denied in cross-examination that she was only one metre away from her student Sze Nok during the demonstration, she claimed further that if her raised leg had come into contact with Sze Nok she would have felt it. And if her skated foot had come into contact with anyone she would have fallen down for the contact would have disturbed her balance.
11. In paragraph 14 of Samantha’s witness statement she said the following:

“I guess that the Plaintiff fell forward and down at that time, possibly because the Plaintiff was a young girl, relatively more flexible, her leg bended backward and thus the top of her head was hit and injured by her own skate.”

1. Her evidence in cross-examination is somewhat different when describing Sze Nok’s flexibility. In Court, she claimed Sze Nok was unique for she was in the top 5% (of the population) in terms of flexibility of limbs. She also said in re-examination that Sze Nok would before each lesson do a warm up by herself; on one or two occasions, Samantha had done it with her and helped her to push her leg up to reach her head.

The medical experts’ report

1. Dr. Brian Choa and Dr. Edmund K.W. Woo jointly examined Sze Nok on 11 June 2008, 2 years after the accident when she was 11 years old. Their findings were similar with no major disagreements. Sze Nok told them that during the incident she had felt a sudden pain in her abdomen, she stooped but did not fall. She could not recall any impact on her head but noticed blood dripping from her scalp. Dr. Choa commented that Sze Nok must have sustained head injury even though she was unaware of it at the time. The shape of the injured area was described as ‘a hole in her skull without a linear crack’, it was more likely caused by a small sharp or sharpish object rather than a fall on a flat surface. Both doctors concluded that Sze Nok had made an excellent neurological recovery with no residual symptom or disability. Dr. Choa concluded Sze Nok could resume normal sporting activities. The two doctors carried out an experiment with Sze Nok at the clinic with Sze Nok adopting the forward arabesque posture. Her head was 42 inches from the floor. They also attempted to hyperextend Sze Nok’s legs while flexing the knees to bring one of her feet up to her head, Dr. Choa found they were many inches short of achieving such a result. It was Dr. Choa’s opinion from the experiment conducted at the clinic that Sze Nok could not have inflicted the injury with her own skates. Dr. Woo did not comment on the matter.

Analysis

1. From the medical experts’ findings of Sze Nok’s injury, the hole in Sze Nok’s skull without a linear crack was more likely caused by a small sharp object rather than from a fall onto a flat surface. Unless there was a sharp object on the surface of the ice which struck Sze Nok when she fell down, or she was hit by a sharp object before she fell down, the skull fracture could not be in the shape it was found. The fact that the fracture was on top of her crown also indicated it is unlikely the fracture was caused by a sharp object on the ice surface. On the cause of the small dented fracture to the head, the Plaintiff suggested Sze Nok was hit by the raised skated right foot of Samantha when she was performing the forward arabesque with her right leg raised behind her to her hip level when gliding forward on the ice. In the School’s defence, Mr. Gomes, Samantha and Vincent suggested that Sze Nok had accidentally lost her balance when the toe pick at the front of her skates got stuck in the ice surface causing her to fall forward, that her legs fell backwards and the toe pick of the blade of one of her skates hit the top of her head causing the fracture on her head.
2. Sze Nok’s mother, Madam Chan, claimed Sze Nok did not possess limbs so flexible that she could flip back her legs to her head and hit herself with her own blades. At the doctor’s clinic two years after the accident, it was confirmed that she could not raise her foot up to the level of her head. Samantha claimed in court that Sze Nok usually had a warm-up before the skating lesson and on a few occasions she had helped Sze Nok to push her leg up to her head. Samantha used the words ‘I helped her to push’. This indicated Sze Nok could not raise her leg to reach her head without assistance. Samantha admitted she did not consider Sze Nok a strong skater, Sze Nok was told to strengthen her strokes and practice the forward arabesque manoeuvres more often even though Sze Nok had learned them before. Is it then possible for Sze Nok to flip her legs back when she fell forward on the ice for one of her skated feet to hit the top of her head and fracture her own skull? I find it unlikely that she should be able to do that after she lost balance on the ice particularly when she did not fall completely flat on the ice surface. Vincent found her kneeling on the ice surface holding her stomach, Sze Nok said she stooped after she experienced stomach pain. It is unlikely for her to have kicked herself on the head when she fell on both knees and knelt on the ice. It is logical when one of the skater’s toe picks got caught in the ice, she would fall forward and flat on the ice rather than for one of her skated feet which got stuck in the ice to kick backward and hit her own head. For this reason, I find the Defendant’s proposition implausible. I reject it completely.
3. This leaves the alternative proposition from the Plaintiff. That Sze Nok was skating so quickly and strongly behind Samantha that the distance between herself and Samantha had narrowed to 1 meter and she caught up and collided with Samantha’s raised right skate as Samantha was completing the manoeuvres.
4. According to Samantha, she instructed Sze Nok to follow her and perform the right leg forward arabesque manoeuvres and to put more strength in her strokes and to bend her back more. According to Sze Nok, when Samantha began to demonstrate the manoeuvres to Sze Nok, the distance between herself and Samantha just before the accident was about 1 metre. Samantha admitted she did not look back while demonstrating the manoeuvres to Sze Nok, though she claimed she could observe Sze Nok’s movements from the reflective perplex lining of the ice skating rink, it is not known if she made sure that Sze Nok was keeping a distance of 3 metres or more behind her at all times while she was demonstrating the manoeuvres. She admitted she did not turn back to look at her student.
5. At the Court’s site visit, the head coach at the School, Miss Linda Dean demonstrated the forward arabesque. She performed a sequence of stroking to gather momentum before starting to gliding with the left foot on the ice, leaning the upper body forward, bending the face forward while arching the back, extending the right leg backward, raising it to the level of the hip and gliding on the ice for some distance before completion. After observing the performance of the manoeuvres, I find it quite possible if Sze Nok was 1 metre or less from Samantha, as Samantha raised her right leg behind her, Sze Nok who was still stroking and gathering momentum, moved so fast behind Samantha that the distance between them had shortened and Samantha’s rising right leg collided with the top of her skull. When Sze Nok was copying the manoeuvres, she had probably extended her upper body and her head forward, thus further narrowing the distance between Samantha and herself. Samantha did not feel the impact probably because the movement when she was gliding forward with her free leg rising was so strong that she was able to move away from Sze Nok after the impact. That was why when Vincent noticed Sze Nok had fallen on the ice surface holding her abdomen, Samantha was obliviously completing the forward arabesque manoeuvres and had moved behind Vincent on the ice rink.

The School’s Responsibility

1. The question for consideration is whether the School had taken adequate care and supervision of Sze Nok. Sze Nok was only 9 years old at the time of the accident, she belongs the class of vulnerable potential victims undertaking a sport that is inherently hazardous.
2. Paragraph 8-134 of Clerk & Lindsell on Torts page 484 stated:

**Known vulnerability of potential victims** The likelihood of harm will also depend on any vulnerability of potential victims of which the defendant knew, or should have known. For example, children are known to be less aware of threats to their safety. Hence, if the defendant is felling a tree while children are watching him, it is not enough for him to warn them to go away before the tree falls; he should take more active steps to see that they are out of the way, for children are attracted by such operations and are too young to appreciate danger.

1. At paragraph 8-135 the authors said:

“**Degree of likelihood of harm** What is relevant is the degree of likelihood that harm may occur. In Lord Dunedin’s words: “People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.”

At paragraph 8-136 the author continues:

“**Severity of the harm** The degree of care also depends on the magnitude of the consequences that are likely to ensue. As Lord Macmillan said: “Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life.” The more serious the consequences, the greater the degree of care which has to be shown.”

1. The School has a responsibility to see that students learning the techniques and skills taught by the School should do so in a safe environment with procedures and methods of teaching that would ensure their safety. It should provide adequate care to students of tender age taking part in a sport which is inherently dangerous. Particularly when the teaching was conducted on a one on one basis, the teacher would be expected to devote his/her full attention on the student he/she was teaching at the time. This is paramount for any institution specializes in sports where young children are involved. An occasional glance at the reflective lining of the rim of the ice rink by the coach cannot be regarded as adequate attention. Perhaps that was why Samantha did not notice Sze Nok’s proximity at a distance of 1 metre behind her.

Use of helmet

1. Mr. Wright, Counsel for the Plaintiff, submitted that helmets should be used in the School for a sport like ice-skating. I agree with him. Figure skating though enjoyable and graceful to watch requires a great deal of strength, agility, technique and skill from the skater. Even though Mr. Gomes insisted that in figure skating, only beginners would wear safety helmets because the helmet would affect the balance of the skater in performing freestyle ice-skating. He claimed it is unlike ice hockey and speed skating where skaters are required to wear safety helmets at all times due to the risk of collision with other skaters or the ice or wall surface. The fact that beginners in figure skating are required to wear safety helmets is evidence of the danger involved. Ice skating is a sport of speed, thus, protective equipment worn by ice skaters whether they be figure skaters, ice hockey players or speed skaters should be similar. For students practising ice skating, there are potential dangers of collision and falls on the ice surface. In my view, the wearing of safety helmets in an ice skating school should be mandatory for young students.
2. Even though Sze Nok had her first skating lesson in June 2002 and had achieved level 2 in free-style skating, she was still a child of 9 years when the accident occurred. Those in charge at the School including the coach and the School should make sure that no harm would come to the students and precautions should be taken for students taking lessons at the School. There are nowadays many different types of helmets used in different sports such as, snow skiing helmets, bicycle helmets, ice hockey helmets and speed skating helmets, etc. They are made with different types of materials. Helmets such as bicycle helmets are light weight and would not affect either the skater’s vision or balance in practice sessions.
3. Paragraph 8-174 of Clerk & Lindsell on Torts at page 514, stated:

**“School responsibility** A teacher is expected to show such care towards a child under his charge as would be exercised by a reasonably careful parent, taking into account the conditions of school life as distinct from home life, the number of children in the class and the nature of those children.”

1. Clerk & Lindsell on Torts at page 516 paragraph 8-176 stated further:

“Failure to adequately supervise contact sports such as rugby may also give rise to liability. The same is true of potentially dangerous activities such as swimming.”

1. If a non contact sport such as swimming is regarded as a potentially dangerous sport activity, so should ice skating be. The School’s responsibility when the teacher and student are on a one on one basis is high. In a fast sport like ice skating, it can be dangerous in a limited space such as the ice rink in question. That is why careful and close supervision should have been given to the student under the care of the teacher and the School at all times. Both the teacher and the School are in loco parentis for a 9 year old student such as Sze Nok.

Contributory Negligence

1. The application of the doctrine of res ipsa loquitur may be drawn from circumstances in which the court may infer carelessness on the part of the Defendant where the claimant can show that the nature of the accident suggests both negligence and the Defendant’s responsibilities.
2. Paragraph 3-54 of Clerk & Lindsell on Torts, page 183 stated:

“**Contributory negligence of children** Conduct on the part of a child which contributes to an accident will not necessarily be judged in the same light as similar conduct by an adult. What is negligence in an adult is not necessarily negligence in a child. The exercise of “ordinary care must mean that degree of care which may reasonably be expected of a person in the [claimant’s] situation”, which in the case of a very young child could be nil.………….

In considering whether a child has taken reasonable care for his own safety regard must be had to the age of the child, the circumstances of the case and the knowledge by the particular child of the dangers to which the defendant’s negligence has exposed him. In *Gough v Throne*, Lord Denning M.R. said that a very young child cannot be guilty of contributory negligence; an older child may be, but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety. This is not an entirely subjective test, because the question is whether an “ordinary child” of the claimant’s age could be expected to have done any more than the claimant, and an ordinary child is neither “paragon of prudence” nor “scatter-brained”. Theoretically, there is no age below which, as a matter of law, it can be said that a child cannot be guilty of contributory negligence, but in practice it is unreasonable to exact a high standard.”

1. In this case, the School had suggested a possible cause of the accident, I do not find the proposition a plausible one for reasons referred to in paragraph 32 above.
2. In measuring the weight on the scale, I find from the surrounding circumstances before and after the accident and from the evidence of Sze Nok, whom I find to be an honest witness who is timid and complaint, the most plausible explanation is that the distance between Samantha and Sze Nok had narrowed to 1 metre or below, when Samantha raised her right leg to hip level behind her, she failed to ascertain Sze Nok’s close proximity to herself, her raised leg accidentally collided with the head of Sze Nok thus causing the injury.

Volenti non fit injuria

1. The latin maxim means ‘no wrong is done to one who consents’. Mr. Li submitted that Sze Nok or her parents had agreed to the ice skating lessons and therefore the School is absolved from legal responsibility by conduct. That Sze Nok or her parent should have full knowledge of the nature and extent of the risks Sze Nok had assumed. As to this defence of consent, there is no better answer than the example given by the authors of Clerk & Lindsell on Torts Chapter 3 paragraph 3-73 at page 195:

“……….For example, a claimant can consent to an invasion of his personal integrity through, save, participation in a contact sport, but he does not thereby agree to accept the risk of negligently inflicted damage during the course of the game. A patient can consent to surgery, but she does not thereby assume the risk of the operation being performed negligently. The requirements for a successful plea of volenti non fit injuria are significantly more stringent than, for example, a simple consent to physical contact (whether socially, or in a sporting or medical context).”

1. Lord Denning in the case of Nettleship v. Weston [1971] 2QB 691 at 701 said:

“Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered and in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is the willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The [claimant] must agree, expressly or impliedly to waive any claim or any injury that may befall him due to the lack of reasonable care by the defendant.”

In paragraph 3-80 at page 199 of Clerk & Lindsell on Torts the authors continued:

“On this approach there must be an agreement of some kind, express or implied, before the relevant act of negligence by the defendant occurs. The claimant’s decision to run a known risk which had already been created by the defendant’s negligence could not constitute volenti. Similarly, in Wooldridge v Sumner, Diplock L.J. said that: “The consent that is relevant is not consent to risk of injury but consent to the lack of reasonable care that may produce that risk.” The claimant could not have agreed to run the risk that the defendant might be negligent because the claimant would only play his part after the defendant had been negligent.”

1. I do not find Sze Nok had in any way contributed to the accident. As a child, her conduct cannot be viewed in the same way as an adult. It is the duty of her coach to look after her safety and to make sure that the student under her charge should learn in a safe manner. Constant attention should have been paid to the student, that was why Sze Nok’s parents sent her to a private lesson rather than a group lesson. The School owes a responsibility to all students of the School. The School is liable not only as the employer of the teacher and as an occupier, but also for failing to provide sufficient protection to its students during ice skating lessons. There should be safety equipment such as helmets, knee pads and guards to protect students from injury during lessons. Students should be warned and given lessons on safety on the ice rink. There should be safety manuals distributed to all students and posted up in the School area. Further, coaches should ensure that students, with the exception of those performing or taking examinations in figure skating, have taken all precautions including the wearing of protective gear while skating on the ice rink.

Conclusion

1. Based on the aforesaid reasons, I find the School negligent both under common law and occupier’s liability for the injury sustained by Sze Nok. As the parties have agreed the quantum of damages at $160,000, the School is liable to pay to Sze Nok the sum of $160,000 as compensation for her injuries.

Interests

1. Interests to be payable from the date of trial to the date of judgment at half judgment rate, thereafter at judgment rate until full payment.

Costs

1. Costs should follow the event. The Defendant shall pay the Plaintiff’s costs to be taxed if not agreed with certificate for Counsel. Should there be no application within 14 days of the judgment, the cost nisi order will be made absolute. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

( H.C. Wong )

District Court Judge

Parties :

Mr. John Wright instructed by Messrs. Bough & Co. assigned by Director of Legal Aid for the Plaintiff.

Mr. Andrew Li instructed by Messrs. W.K. To & Co. for the Defendant.