#### DCPI 1671/2010

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1671 OF 2010

BETWEEN

|  |  |
| --- | --- |
| IP WAN FUNG (葉雲峯) | Plaintiff |
| and |  |
| CHEUNG WING HONG trading as BILLION RESTAURANT CO.  (張永康經營的仟億茶餐廳) | Defendant |

Coram : Deputy District Judge K. H. Hui in Court

Dates of Hearing : 17 May 2012

Date of handing down of Judgment : 6 June 2012

## JUDGMENT

Introduction

1. This is a personal injury claim arising from a “slip and fall” accident.

Background

1. On 30 March 2009, the Plaintiff (“Mr. Ip”) visited a restaurant known as “仟億茶餐廳 “ situated at Ground Floor, Ngau Chi Wan Village, No. 5, Fu Chi Path, Ngau Chi Wan, Kowloon, Hong Kong (“the Restaurant”) to promote food products for Tsit Wing Coffee Company Limited (“Tsit Wing”), his employer.
2. The Defendant (“Mr. Cheung”) was the operator and occupier of the Restaurant.
3. While Mr. Ip was near at the cashier counter inside the Restaurant, he stepped on some greasy and/or unknown slippery substance. He slipped, fell and sustained personal injuries.
4. Mr. Cheung was legally represented until 27 April 2011. Thereafter he acted in person. In his Defence dated 23 December 2010, Mr. Cheung denied liability and quantum of damages.
5. Notwithstanding the Unless Order of the Court given on 8 November 2011, Mr. Cheung has failed to file any witness statement or Answer to Statement of Damages (for the Unless Order, see Bundle p30). Mr. Cheung was present when the Court granted the said Order.

The Plaintiff’s Case

1. Mr. Ip is the only witness.
2. At around 4:45pm to 5:00pm on 30 March 2009, Mr. Ip arrived at the Restaurant to promote the products of Tsit Wing. Having entered the Restaurant, he walked towards the cashier counter and introduced himself to a Ms. Cheung who was working thereat. After his work, Mr. Ip intended to leave. In the course and at the doorway (still inside the Restaurant), Mr. Ip stepped on some greasy and/or unknown slippery substance. He slipped and lost his balance. He hit his head against the glass door of the Restaurant and then fell to the ground and landed on his back. He sustained personal injuries at the back and the head (“the Accident”).
3. Under cross-examination, he denied the suggestion that he was in a hurry when he was leaving the Restaurant.
4. After the Accident, Mr. Ip was sent to Queen Elizabeth Hospital (“QEH”) for medical treatment. There was local tenderness over his low back. The clinical diagnosis was back contusion. He was admitted overnight for observation and was discharged on 31 March 2009.
5. Between 3 April 2009 and 17 April 2009, Mr. Ip had attended the Department of Family Medicine & General Outpatient Clinic at Fanling (“the GPOC”) for 4 times. He complained of persistent back pain which exacerbated on walking and prolonged standing.
6. Mr. Ip was referred to the Physiotherapy Department, North District Hospital, for treatment. In the initial assessment on 7 August 2009, Mr. Ip complained of back pain over his lateral aspect of left leg. The lumbar rotation was 3/4 on the right side and 2/3 on the left side. The Straight Leg Raising (SLR) range was 70° on the right and 60° on the left side with pain. The myotone of the L2 and S1 was grade 4, myotone of L3 to L4 was grade 4+ and myotone of L5 and S2 was grade 5-. His last session was on 16 September 2009. He defaulted treatment after 5 sessions as from 24 September 2009 due to work.
7. Mr. Ip had consulted Dr. Poon Kai Ming, Dr. Chang Shao, Dr. Yong Kong Fan and Dr. Hung Siu Lun, who are specialists in orthopaedics and traumatology in private practice, on divers occasions between April 2009 and August 2009 respectively.
8. Mr. Ip sought and is still seeking out-patient treatments at government clinics from time to time after the Accident. He was scheduled to receive physiotherapy treatment in September 2012.
9. Mr. Ip was examined by Dr. Wong See Hoi (“Dr. Wong”), the single joint medical expert, on 17 March 2011. He complained there were intermittent and daily attacks of low back pain that last for 2-3 minutes. There was pain after walking for 15 minutes while holding samples of food products or bending down to lift heavy objects.
10. Dr. Wong found there was tenderness from L2 downwards. There was decrease in back range of movement for extension and mild muscle waste at right calf. Dr. Wong opined that Mr. Ip could resume his pre-injury work as food product salesman with reduction in work efficiency on prolonged walking especially while carrying heavy food product samples.
11. Dr. Wong agreed that sick leave up to 23 September 2009 is appropriate.

The Defendant’s Case

1. Mr. Cheung is debarred from calling any witness as he has failed to comply with the Unless Order. There is thus no evidence from Mr. Cheung.

Discussion and Analysis

1. The issues here are (i) whether Mr. Cheung is liable for the Accident; and if so, (ii) the quantum of damages.

*Liability*

1. I have carefully considered the evidence of Mr. Ip. His evidence at the trial was clear, concise and consistent with his witness statement. In the absence of evidence to contradict his version, I see no reason why I should not accept his evidence.
2. It is my ruling that the Accident took place inside the Restaurant as described by Mr. Ip. As a result of the Accidents, he suffered personal injuries as complained and described by the medical doctors.
3. Since Mr. Cheung admitted in his Defence that he was the occupier of the Restaurant, there can be no dispute as to his duty under the Occupiers Liability Ordinance, Cap.314 (“the Ordinance”). He has to take reasonable care to ensure that the visitors of the Restaurant would be reasonable safe in the Restaurant.
4. Mr. Lau, solicitor for the Plaintiff, submitted that Mr. Cheung must not create danger himself. Further, he must take reasonable steps to protect his visitors from dangers which he did not create himself. I agree (see *Clerk & Lindsell on Torts*, 20th edition, para.12-25 at pp.811-812).
5. Mr. Cheung submitted that there was a warning notice affixed at the cashier counter. This notice can be seen in the photographs at p76 of the Bundle. Mr. Ip told the Court that he was not aware of this notice before the Accident.
6. Section 3(4) of the Ordinance provides that:-

*“(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-*

*(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe …”*

1. There is no evidence as to whether the warning notice was there at the time of the Accident. Even if it was, the question here is whether the warning is enough to enable Mr. Ip to be reasonably safe. A notice placed in an unsuitable place will not help to discharge the common duty of care. The notice is at the side of the cashier counter and at waist level. I accept the evidence of Mr. Ip that he was not aware of the notice. Further, it is my ruling that it is too small and not affixed at a conspicuous place to serve its purpose.
2. Mr. Cheung also submitted that there was another warning notice on the left glass door underneath the poster (see also p76 of the Bundle). There is also no evidence as to whether this warning notice was there at the time of the Accident. I had pointed out to Mr. Cheung that I cannot read the words of the notice because of the quality of the photograph. Mr. Cheung agreed that he cannot read that too.
3. I note that there is no evidence as to what the greasy or slippery substance was on the floor or why such greasy or slippery substance was there. In the absence of any explanation from Mr. Cheung, I can only conclude that Mr. Cheung has failed his duty as the occupier of the Restaurant.
4. It is my ruling that Mr. Cheung is liable for the Accident and the injuries sustained by Mr. Ip.
5. There is no mention of contributory negligence in the pleading and thus I need not consider it. Even if I have to, it is my ruling that there is no contributory negligence.

*Quantum of Damages*

PSLA

1. Mr. Ip was born on 10 July 1975. He was 34 years old at the time of the Accident and he is now almost 37 years old.
2. Mr. Lau submitted that the Court should award $150,000 under this head. He relied on the following authorities:
3. *Chan Chung Keung v Greenroll Limited trading as Conrad Hong Kong* (HCPI 275 of 2005, Deputy Judge Carlson, 20 December 2005);
4. *Cheng Liu Nei Su v Clare Environmental Services Limited* (DCPI 842 of 2008, HH Judge H.C. Wong, 30 July 2009); and
5. *Tam Kwok Man v The Kowloon Motor Bus Company (1993) Ltd* (HCPI 755 of 2001, Mdm. Justice Beeson, 11 July 2003).
6. In *Chan Chung Keung*, the plaintiff slipped and fell on the wet floor and landed on his bottom. There was no fracture. The court found that this was no more than a soft tissue injury which exacerbated a pre-existing weakness caused by the natural ageing process. PSLA awarded: $180,000.
7. In *Cheng Liu Nei Su*, the plaintiff fell off from a ladder and landed on her buttocks and back. The plaintiff sustained some soft tissue injury but there was no major structural damage to the back. PSLA awarded: $150,000.
8. In *Tam Kwok Man*, the plaintiff fell on the ground from an office chair sustaining back injury resulting in minor back impairment and residual pain. PLSA award: $150,000.
9. I have also considered the following authorities:
10. *Lee Yuk Lan v Royaltelle International Ltd. t/a The Royal Garden* [1999] HKCFI 364; HCPI187 of 1995, Mdm. Justice Beeson, 5 August 1999;
11. *Poon Yat Chiu v Aes Scaffold Engineering Ltd* (DCPI 223 of 2005, HH Judge Chow, 21 March 2007); and
12. *Chau Ka Ming v Lee Wai Kong also known as Lee Wai Kong Ronald* (DCPI 1478 of 2005, HH Judge Lok, 12 January 2007)
13. In the light of the injuries sustained by Mr. Ip, the treatments he received and the submission of Mr. Lau, I am of the view that an award of $150,000 under this head is fair and reasonable.

Pre-trial loss of earnings

1. At the time of the Accident, Mr. Ip was employed by Tsit Wing as a salesman earning a monthly salary of $9,000 plus commission and allowance. His average pre-accident earnings was about $12,000 per month.
2. He was granted sick leave for 6 months, up to 23 September 2009.
3. Mr. Ip resumed his pre-accident employment upon expiry of the sick leave. However, he was dismissed with effect from 23 October 2009.
4. Thereafter, Mr. Ip had worked for different employers. Nevertheless, he only worked for each of them for a short period because he was unable to fulfil his job duties by reason of the back pain.
5. His post-accident employments and income are as follow:

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| --- | --- | --- | --- |
| Period | Employer | Position | Monthly Earnings |
| 1/11/2009 – 31/12/2009 | 三聯亞洲有限公司 | Sales Supervisor | About $8,000 |
| 10/1/2010 – 26/5/2010 | 唐順興家禽 | Sales Supervisor | About $8,000 |
| 7/6/2010 – 5/7/2010 | Ho Fung Food Ltd (浩豐食品有限公司) | Sales Executive | $10,700 |
| 12/7/2010 – 28/7/2010 | Top Harvest Asia Ltd (豐益亞洲有限公司) | Sales Representative | $10,000 plus commission of about $2,000 |
| 2/8/2010 – 30/11/2010 | Sims Trading Co Ltd (慎昌有限公司) | Sales Executive | $10,520 plus commission of about $2,000 |
| 1/12/2010 – 29/4/2011 | Euro Foodstuff (Int’l) Co Ltd (歐陸食品(國際)有限公司) | Sales Executive | $11,900 |
| 6/5/2011 – 30/6/2011 | KYE Systems (HK) Corp. Ltd. (昆盈企業(香港)股份有限公司) | Sales Executive | $9,500 |
| 4/7/2011 – 26/8/2011 | Sheen Harvest (豐順(遠東)有限公司) | Sales Executive | $10,800 |
| 29/8/2011 – 10/1/2012 | ASA Pacific (益生貿易有限公司) | Sales Supervisor | $12,000 (for the first 3 months; thereafter, $8,000 plus commission) |
| 10/1/2012 – present | Unemployed (on CSSA) |  |  |

1. Mr. Lau submitted that Mr. Ip is entitled to a total loss of earning for the sick leave period. I agree as it is supported by Dr. Wong.
2. For the post-accident employment, Mr. Lau claims a partial loss of earning in the sum of $2,000 per month for 30 months. It should be noted that Mr. Ip was on Comprehensive Social Security Assistance since January 2012 and he only received around $9,000 per month. Nevertheless, he maintains his claim of loss at $2,000 per month.
3. Base on the earnings as shown above, I accept Mr. Lau’s submission.
4. The total award under this heading is $132,000 ($12,000 x 6 + $2,000 x 30 months).

Future Loss of Earnings

1. Mr. Ip told the Court that he intended to look for another job in the near future. He claimed that he could find a job with monthly salary of $9,500. The monthly loss is therefore $2,500.
2. Since Mr. Ip is still suffering from residual disability, I accept that his working efficiency is affected and thus not being able to earning $12,000 per month as before. I also accept that Mr. Ip could at the best find a job with monthly earning of $9,500.
3. I adopt a multiplier of 13 as suggested by Mr. Lau. The total award including MPF under this head is $2,500 x 12 x 13 x 1.05 = $409,500.

Loss of Earning Capacity

1. Mr. Lau submitted that Mr. Ip has difficulty in getting further employment as a food products salesman and will suffer a disadvantage in the labour market.
2. The employment history tells us aloud that Mr. Ip has suffered a disadvantage in the labour market. As part of the duties of a salesman is to carry product samples for business promotion, Mr. Ip is clearly in a less competitive position when compared with those who are able-bodied.
3. I accept Mr. Lau’s submission. I allow the claim of $50,000 which is around 5-month salary of his targeted new employment.

Medical and other expenses

1. Mr. Ip claims for the following:

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| --- | --- |
| Nature of Expenses | Amount |
| Medical expenses | $4,460 |
| Travelling expenses | $2,510 |
| Tonic food | $2,000 |
| Total: | $8,970 |

1. Although these expenses are not fully supported by receipts, I accept that Mr. Ip did incur such expenses.
2. The amounts are reasonable and I allow them in full.

Conclusion

1. I enter judgment in favour of the Plaintiff in the sum of $620,140.

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| --- | --- |
| Item | Amount |
| PSLA | $150,000 |
| Pre-Trial Loss of Earnings | $132,000 |
| Loss of Future Earnings | $409,500 |
| Loss of Earning Capacity | $50,000 |
| Medical and other expenses | $8,970 |
| Less: Employees’ Compensation received | ($130,329.99) |
| Total: | $620,140 |

1. I also order that the Plaintiff is entitled to interest at (i) half judgment rate for special damages from the date of the Accident and (ii) 2% on general damages from date of writ to date of judgment and thereafter at judgment rate until full payment.
2. I make an order nisi that the Defendant to pay the costs of this Action including all costs reserved to be taxed if not agreed. The Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. This order nisi shall become absolute unless there is application to the otherwise within 14 days after handing down of this Judgment.

( K. H. Hui)

Deputy District Judge

Mr. Lambert Lau, of Messrs. Keith Lam Lau & Chan, for Plaintiff

Defendant: in person, present