DCPI 2067 of 2009

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES ACTION NO. 2067 OF 2009**

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

###### CHIANG KI CHUN IAN, a minor suing by Plaintiff

###### his mother and next friend,

###### CHOW YUEN MAN LOUISE

and

LI YIN SZE Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: Deputy District Judge C. Lee in Court

Dates of Trial: 4th and 5th of October 2010

Date of Handing Down Judgment: 8th October 2010

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

JUDGMENT

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**I. INTRODUCTION**

1. This is a dog-bite case in which the Defendant disputed both on the issues of liability and quantum. The main issues for determination at trial are (i) whether the injured person, Ian teased the dog before he was bitten? If so, whether any persons at the scene warned him not to do so? If so, whether these absolve the Defendant from liability or to what extent liability has to be apportioned; (ii) whether the Defendant was negligent? (iii) to what extent the quantum is disputed? If any of the items are in dispute, what are the legal propositions in support?

**II. ADMITTED FACTS**

1. The injured person is known by the parties as Ian. At the time of the incident on 20th June 2009, he was 9 years old. The incident took place at the Defendant’s premises situates at No. 68 Sheung Sze Wan, Clear Water Bay, Sai Kung, Kowloon (“the Premises”). It is a village house. Ian and his younger brother were invited by Ian’s classmate, Kenneth and the Defendant to attend a play-day at the Premises. It is a common ground that the scene was in the living room near the sofa. At the time of the incident, none of the children’s parents were at the Premises. Although there were 6 children, including Ian and 5 domestic helpers were at the Premises, there was no other eye-witness. That was Ian’s 1st visit to the Premises.
2. The Defendant was the owner and keeper of the male dog under the Dogs and Cats Ordinance, Cap. 167. It is a brown Mongrel of about 2.5 feet in height. Its name is Pocky. At the material time, Pocky was leashed at the corner of the living room but it was not muzzled. It was within the reach of the children at the Premises.
3. There is no evidence to suggest that Pocky has any history or propensity of attacking any person or other animals.
4. Ian was bitten by Pocky near the sofa when it was leashed but was not muzzled. Ian received bite wounds on his left face.

**III. PLAINTIFF’S CASE**

1. Mr. Wong, Counsel for the Plaintiff clarified that the Plaintiff shall rely on common law negligence as the cause of action, rather than Occupiers Liability Ordinance as pleaded. I do not intend to repeat the pleaded particulars of negligence here. Suffice for me to say that some of the complaints might be more relevant: “*Causing, allowing or permitting the Dog to be placed in such a position where the Defendant could reasonably foresee that the Dog might cause damage and injury to the Plaintiff.” ; “Exposing the Plaintiff to a risk of injury of which the Defendant knew or ought to have known and that it was dangerous and unsafe so to do”; “Failing to ensure that the Dog was properly watched or restrained when the Dog was staying in close vicinity of young children, including the Plaintiff”*. The Plaintiff says that the Defendant was negligent through her servant, include the domestic helpers.

**IV. DEFENCE CASE**

1. The Defendant did not dispute that Pocky bit Ian. It raised two alternative defence. Firstly, Pocky wanted to eat the dog’s biscuits in Ian’s hand that caused Ian to back track and Pocky bit him accidentally on Ian’s left face. Alternatively, Ian teased Pocky. Pocky was irritated and it bit Ian as a result. The Defendant seems to rely on Ian’s alleged conduct to deny liability or for the plea of contributory negligence. It also turns out that most of the items regarding quantum are not disputed.

**V. ISSUES**

1. Apart from the issues framed at the outset, the crux of the issue is whether Pocky is put in such a position that a reasonable man would know that it was likely to cause danger and therefore he ought to regard himself as under the obligation to do something by way of precaution.

**VI. WITNESSES & EVIDENCE**

1. Ian, his mother, (“Madam Chow”) and their domestic helper, Ms. Pasyan Florence Lencio (“Florence”) gave evidence for the Plaintiff’s side. Another child, Kenneth Tong and his mother who is the Defendant here gave evidence (“Mrs. Tong”). Dr. Daniel T.C. Lee’s medical report was admitted without him testifying.
2. Madam Chow’s evidence is more relevant to Ian’s treatment and the question of quantum. I shall come to her evidence later.
3. Ian’s relevant evidence can be summarised as follows:-
4. He denied that he has used sausage and spaghetti to tease Pocky.
5. He was not warned by anybody before he played with the dog.
6. That was his first time’s visit to Kenneth’s home. He only came to know that a dog was kept in the Premises when he saw it.
7. Upon arrival, he and his younger brother took lunch first and their domestic helper sat next to them. He did not leave the dining table until he finished the meal. Then out of the 6 children in the Premises, 4 of them went upstairs. Ian and Anson stayed in the living room and played with Pocky. Anson also left Ian for the group upstairs later. Ian stayed with Pocky. He patted Pocky. He then went to the coffee table to fetch a dog’s biscuit to feed Pocky. After Pocky ate it, it suddenly bit on his left face. He felt painful and panic. He went to the kitchen where he found Florence who told his mother about the incident. Pocky did not bark or growl before it bit.
8. Ian was hospitalized for 8 days. After being discharged, he received scar removal laser treatment. At trial, it is recorded that one could barely see 2 scars on his left face in about one feet distance. The 1st scar is below the left orbital region and its colour is lighter than other parts of his face bearing in mind Ian’s skin is relatively darker. It measures at about 20mm x 2 mm. The 2nd scar is also on his left face adjacent to his nose. Its colour is lighter than the 1st scar and it measures at about 15mm x 2mm.
9. After the incident, he had nightmare about dogs for 2 to 3 times. He was scared on dogs of bigger size.
10. Florence’s relevant evidence can be summarised as follows:-
11. She did not see that Ian has teased the dog nor she warned Ian not to do so as alleged by the Defendant through Kenneth.
12. Before she was told by Ian that he was bitten, there were 5 domestic helpers inside the Premises. Kenneth’s 2 helpers were preoccupied with household works in the kitchen. She was around the dining area but she did not see how the incident happened. After the incident, Kenneth’s helper immediately leashed the dog to the garden area.
13. Mrs. Tong’s relevant evidence can be summarised as follows:-
14. She has kept Pocky since 2003. It is a tame dog and got well with her cat and her family. Her family often had party with visitors and children. Pocky never had any behavioral problem. Hence, Pocky did not have to be leashed or muzzled at home even if there were visitors.
15. Later that day she was told by Kenneth that Ian has used sausage and spaghetti to tease Pocky before the incident.
16. After the incident and investigation, the Agricultural and Fisheries Department issued a letter to her dated 10th August 2009 that she was not in breach of any regulation about dogs.

1. Kenneth’s relevant evidence can be summarised as follows:-
2. Upon Ian’s arrival, Kenneth’s helper got some sausage and spaghetti for Ian’s group. 5 domestic helpers stayed around the kitchen area. Ian seemed not to be hungry. He got a piece of sausage from the dining table. He approached Pocky, pretended to feed it and said: “Pocky come, Pocky come”. Pocky was annoyed and growled. Anson asked Ian not to tease Pocky.
3. Ian later had a mouthful of spaghetti and approached Pocky again with about 1 feet distance. He opened his mouth. Pocky seemed to be unhappy and barked. Ian’s helper, Anson and Ryan also asked Ian not to tease Pocky. Ian then went back to the dining table.
4. Kenneth then went upstairs with Ryan and Anson while Ian said he wanted to stay in the living room and played with Pocky for a while. He was later notified by his helper to go downstairs. He saw Ian was bleeding on his face. Ian’s younger brother, Nicholas told Kenneth that when Ian was feeding Pocky, Pocky crawled and hurt Ian.

**VII. ANALYSIS AND DISCUSSION**

**Factual findings**

1. The parties did not have great divergence on facts save as to the different versions on the question of teasing. Both Ian and Kenneth are smart boys and tried their best to account for the sequence of events. It seems to me that Ian’s version is more reliable than Kenneth’s for the following reasons. Firstly, Ian’s version is simple and straightforward. His version is hardly shaken under cross examination. In contrast, Kenneth seemed to be evasive when certain simple questions were put to him. For example, had Pocky been well behaved before, why was it leashed at the time and was not let free? Had you warned Ian not do tease Pocky, were you worried about Ian’s safety or did you warn him of the danger if he carried on teasing? His answers seem to be “not so good … I do not know how to answer or it did not occur to me…”. After all, shortly before Ian was bitten, Ian said that he fed Pocky with biscuits, this is corroborative by Kenneth’s own statement in which he said that “I saw Ian was bleeding on his left face. Nicholas told me that when Ian attempted to feed Pocky with biscuits, Pocky crawled and hurt Ian.” This part of hearsay evidence related by Kenneth seems to support Ian’s version. That is shortly before the incident, what Ian did was to feed or attempt to feed Pocky who out of sudden, bit Ian on his face. In essence, on the balance of probabilities, I prefer Ian’ s version than Kenneth’s unless there is no conflict. Other witnesses’ evidence were unchallenged.

**The Law and its application**

***Scienter***

1. The doctrine of *scienter* is that “*the custodial or owner of domestic animals may be liable for damages if he has knowledge of the animal’s propensity to cause injuries to human beings. No liability exists where the damage was done wholly due to the fault of the person suffering it or had voluntarily assumed the risk”: Mujiati v Chong Wai Kwan DCPI 424/2003.*
2. Mr. Chang, Counsel for the Defendant stressed that there is no evidence to suggest that the Defendant has any knowledge of Pocky’s propensity to attack, which is an essential ingredient to establish liability based on the doctrine of *scienter*. Further, the Plaintiff chose not to rely on the Occupiers Liability Ordinance. The Plaintiff merely relied on the breach of the ordinary duty of care and negligence. Mr. Wong, Counsel for the Plaintiff agreed that that is his latest position during his opening submission.

**Negligence**

1. In respect of the question of negligence, Mr. Chang referred me to *Li Yuk-lan v Lau Kit-ling [1989] 2 HKLR 128* in which the Court of Appeal held that “*The owner of a domestic animal was liable for damage caused by the animal only if either the owner knew of a propensity to mischief particular to the animal, but not common to the species in general, or if there are particular circumstances which in themselves imposed on the owner a duty to take care.”*
2. The said authority consists of two different grounds upon which an animal owner may be held liable and both Parties focus on the 2nd ground, namely, *“if there are particular circumstances which in themselves imposed on the owner a duty to take care.”*
3. For further elaboration, Mr. Chang relied on *Drapper v Hodder [1972] 2 QB 556 at page 570E-F*: *“the owner of a tame dog may be liable in negligence if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause danger to people lawfully passing the highway… there may be cases in which a defendant may be liable for the bite even if the dog does not belong to the class of ferocious animals, if it be proved that the dog is put in such a position that a reasonable man would know that it was likely to cause danger and therefore he ought to regard himself as under the obligation to do something by way of precaution.”*
4. He went on to quote pages 571B-D and 580G-H: *“if everyone was obliged to be constantly vigilant through his fear of such a misfortune, it would hardly be safe ever to let a horse out of its stable.”; “negligence cannot be established merely by proof that a defendant had failed to provide against the possibility that a tame animal of mild disposition would do something contrary to its ordinary nature.”*
5. Mr. Chang submitted that the question of foreseeability is not tested by looking at the unfortunate injury to the plaintiff and then say it was foreseeable “merely because it happened”.
6. I do accept the legal propositions advanced by the Defendant. I accept that the Plaintiff is unable to establish liability on *scienter,* not only it is not pleaded, there is no evidence to suggest that the Defendant has *“the necessary knowledge on the animal’s propensity to attack”.*

1. The ultimate question thus hinges upon the ambit of the ordinary duty in this case. It requires an analysis on *whether Pocky* *was put in such a position that a reasonable man would know that it was likely to cause danger and therefore the Defendant ought to regard himself as under the obligation to do something by way of precaution.”*
2. To begin with, I accept that Pocky does not belong to the class of ferocious animal because to say the least, Counsel for the Plaintiff did not say so. Put the defence case to the highest, even assuming Ian has teased Pocky or was playful in the way as described by Kenneth, in my view, this does not absolve the Defendant from liability. It seems to me that the uncontroverted evidence is this. That was a play day, not a birthday party, the Defendant knew or ought to have known that the children’s parents were not supposed to be there and in fact no parent was present. The Defendant knew or ought to have known that only 6 children and 5 domestic helpers, in addition to Pocky would be in the Premises. Ian and his classmates were around 9 years of age and the rest of the children are even younger as they were younger brothers. They are boys. It is reasonably foreseen that boys of that age are normally playful, if not naughty. Or at least, they would get excited in a group. It must also be noted that it was the first visit by Ian to the Premises. The Defendant should have reasonably foreseen that Ian, as a stranger boy vis-à-vis Pocky may not know how to handle Pocky. Pocky may not treat Ian as if he is part of the master’s family. In other words, the foundation of friendship between Pocky and Ian is likely to be weaker than that of between Pocky and the Defendant’s family. All these indicate an exposure of risk of a young visitor being attacked by Pocky if Pocky, rightly or wrongly interpreted the visitor’s acts being unfriendly, including teasing it with food, which if I may say a real risk and danger, should have been foreseen by a reasonable man.
3. What then is her duty in light of this foreseeable risk? In my view, the Defendant should have exercised the duty as if she is a reasonably careful parent towards children under her charge. Although she was not present, the children were invited by her or they were there with her permission: *see Chan Kin Bun v Wong Sze Ming [2006] 3 HKLRD 208*. I say “reasonably careful parent”, not just vis-à-vis her own children, but towards other children who made the 1st visit, who was not accompanied by parents, who might be playful, who might be lacking experience in handling a dog and who might be less careful than an adult. In short, the Defendant was under an obligation to do something by way of precaution. Without parents there, the role of the domestic helpers becomes more important. One of the easiest and practicable precaution is to give clear instruction to one of her own helpers to keep regular, not continuous supervision over the dog. I say “regular” because the more the numbers of the young children were present without accompanying parents, the higher the risk of the dog will get excited or will cause injury to the children, whether the dog attacked the children or hurt the children accidentally while playing. Regular supervision on the dog may not be necessary if more parents were present. Mrs. Tong admitted that she has not given such instruction to her helpers because her dog has a “good record”. However, “good record” is only relevant to the doctrine of *scienter*. On the topic of negligence, knowledge is not an essential ingredients, it is rather a question of foreseeability, precautionary measures, risk assessment and risk taking. I am ofthe view that the Defendant failed to exercise the duty of a reasonably careful parent.
4. Knowing that her two helpers might be preoccupied in kitchen’s works, another reasonable and practical precaution is that the Defendant should have done is to give instruction to one of her domestic helpers, to move the dog beyond the reach of the children say in the garden or roof top of the Premises, after they played with the dog under the helper’s supervision, Again, the Defendant has not done so.
5. In short, the Defendant was negligent in failing to give proper instructions to her domestic helpers in light of the foreseeable risk. Or the Defendant is vicariously liable for her domestic helpers’ failure to keep regular supervision on the dog when it is within the reach of the children.
6. In summary, Pocky was put in such a position that a reasonable man would know that it was likely to cause danger and therefore the Defendant ought to regard herself as under the obligation to do something by way of precaution. Yet she failed to take such simple precautionary measures.
7. Regarding the Defendant’s contention of accidental bite, my view is that had Pocky been so excited with the intention to eat the biscuits in Ian’s hands and bit Ian accidentally, the Defendant is still liable upon his pleaded defence of accidental bite because *“the owner of a tame dog may be liable in negligence if he puts it in such a position and in such circumstances as render it likely that the dog will get excited…”: Drapper v Hodder*. By reason of the matters aforesaid, the circumstances of this case shows thata reasonable man would know that Pocky would get excited when a young boy was free to play and feed the dog that he met for the first time without any adult’s supervision, albeit it is a tame dog.

**Contributory negligence**

1. Since I find that Ian has not teased Pocky and shorty before the incident, Ian merely fed Pocky with biscuits, the Plaintiff is not liable for contributory negligence.
2. Even if Ian has teased Pocky, I do not see how a 9 year-old boy should be blamed for being playful when the dog keeper and her domestic helpers simply failed to exercise the duty of a reasonably careful parent. With the above factual matrix, I do not see fit to apportion any responsibility to Ian: *Poon Hau Kei v Hsin Chong Construction Co Ltd [2004] 2 HKLRD 442*, by the Court of Final Appeal.

**Conclusion on Liability**

1. I find that Ian did not tease the dog before he was bitten. He was not warned not to tease the dog. The Defendant was negligent.

**VIII. Quantum**

**Pre-Trial loss and Expenses : Out-patient expenses**

1. I now come to the items that are in dispute. The Defendant took issue of the out-patient expenses in the sum of $20,600. Mr. Chang said that there was overlapping between pre-trial and future medical expenses. He said that the Plaintiff’s own doctor opined that Ian should receive treatment on his scars for 6 to 12 months from August 2009. Therefore, any medical expenses incurred after 12 months’ period, even if it relates to scar treatment, should not be allowed. I do not agree. The doctor gave his estimation of the period of treatment. I do not see how this estimation could have been interpreted as akin to “time bar”. It depends on necessity upon medical advice. Madam Chow’s unchallenged evidence is that the previous treatment was done with medical advice. The next medical appointment with Dr. Li is late October 2010 by then Dr. Li will decide whether Ian still requires the 2nd scar removal laser treatment. In brief, this item should be allowed. The Plaintiff said that a more recent expense incurred in the sum of $1,500 dated 28th August 2010 should be added making a total sum of $22,100. All these expenses are supported by receipts and were disclosed beforehand. There is no challenge on the propriety of those expenses, thus there is no basis for not allowing the total sum of $22,100 for out-patient expenses.

**Future Loss and Expenses**

1. The Plaintiff relied on Dr. Li’s opinion to suggest that for 12 months from the date of the report made in August 2009, it is expected that Ian needs to attend further consultation 2 times a month during a 12 months’ period with estimated expenses of $36,000, in addition to 5 laser treatments with estimated expenses of $20,000. Since I have allowed the medical expenses between August 2009 and August 2010, the next question is whether the estimated medical expenses to be incurred after trial is reasonable and necessary. Madam Chow’s evidence is that the consultation became less frequent from once in every two months to once in 4 months recently. It is unknown whether Ian requires 2nd laser treatment, it all depends on the doctor’s advice in the next consultation. In my view, comparing Dr. Li’s opinion with Madam Chow’s evidence on the latest development, it seems that Ian’s scar improved much better than what the doctor expected. In my view, the last, which is also the first laser treatment took place on 27th November 2009, had Dr. Li opined that 2nd laser treatment is required, he would have so advised. However, the last consultation in August 2010 did not suggest laser treatment. Therefore in the absence of a more recent medical opinion, with these objective matters in mind, I do not see further consultation and laser treatment after trial is necessary. In essence, I disallow this item.

**Pain, suffering and loss of amenities (“PSLA”)**

1. The Plaintiff claims for $150,000 while the Defendant says the amount should not exceed $80,000.
2. In *Susi Yanti & anor v Chu Shiu-chuen* HCPI176/2000, Master de Souza (unreported, 2nd November 2001), a 4-year old girl was attacked by a pack of dogs, and suffered three laceration wounds over both thighs with multiple minor bite/scratch marks over her thighs and left arm. She was treated with analgesics, dressings and antibiotics as well as a course of anti-rabies vaccinations. She suffered nightmares and developed a fear of dogs. About a year later, various scars with differing but slight degrees of being noticeable, pigmented and/or raised, barely perceptible bite marks, and noticeable stitch marks were found. An award of HK$130,000.00 was given for PSLA.
3. In *Chiu Oi Lung by his mother and next friend Shek Kam Kiu v Wong Yuet* DCPI115/2006, Deputy Judge A B bin Wahab (unreported, 22nd February 2007), the 10-year old boy was bitten by a dog just below the left eye. Physical examination showed a 1.5cm x 1cm wound with tissue loss over left infra-orbital area. He was given daily dressing and injection of anti-rabies vaccination. He attended regular outpatient treatment for over two months and was granted 18 days of sick leave. Subsequently, the plastic surgery expert found that the 33mm x 2mm pale atrophic scar caused mal-function of the plaintiff’s left lower eyelid, which could not close tightly and thus often caused his left eye to be dry leading to itchiness and frequent rubbing of the eye. The plastic surgery expert recommended revision surgery. The plaintiff also developed some degree of cynophobia. The PSLA award was HK$100,000.00.
4. It seems to me that the injuries suffered by the Plaintiff in the present case are much less serious. At trial, it was quite difficult to discover his scars even in a short distance of about 1 feet. Though with nightmares about dogs 2 to 3 times since the incident, Ian is not fearful of dogs of smaller size. In all the circumstances, I consider that an appropriate award for PSLA is HK$80,000.00.

**Conclusion on quantum**

1. These items are not in dispute, they are hospitalization expenses in the sum of $44,462, travelling expenses in the sum of $3,500, tonic food in the sum of $2,000. In summary, I allow these items:-

|  |  |
| --- | --- |
| PSLA | 80,000 |
| Pre-Trial loss and Expenses | 44,462 (hospitalization expenses)  22,100 (out-patient expenses)  3,500 (travelling expenses)  2,000 (tonic food)  52,062 |
| Total | 132,062 |

1. I therefore order the Defendant do pay damages in the sum of HK$132,062.00 to the Plaintiff. Interest is payable on the award for PSLA at 2% per annum from the date of the Writ of Summons to the date of judgment herein, and on pre-trial loss and expenses from the date of the Accident to the date of judgment herein at half judgment rate and thereafter at judgment rate until payment.
2. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that the Defendant shall pay the Plaintiff costs of the action (with all costs reserved, if any) to be taxed if not agreed. Parties agreed that there shall be certificate for counsel and it is so granted.

(Clement Lee)

Deputy District Judge

Mr Damian Wong instructed by Messrs Szwina Pang, Edward Li & Co for the Plaintiff.

Mr. Jonathan Chang instructed by Messrs Szeto Virginia & Co for the Defendant