DCPI 2372/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO.2372 OF 2006

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BETWEEN

NG HO YIN (a minor) by

CHAN WAI YU KITTY,

his mother and next friend Plaintiff

and

LAU WAI CHUN AKI 1st Defendant

LAU KA MAN CARMEN trading as

Prince William Education Centre 2nd Defendant

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Coram: Deputy District Judge Ronald Tang in Chambers

Date of Hearing: 29th May 2008

Date of Handing Down Judgment: 3rd June 2008

### JUDGMENT

# Introduction

1. This is an application by the 1st Defendant to set aside a default judgment entered against her on 6th September 2007.

# Background

1. This action is a personal injuries action which arose out of a traffic accident on 26th August 2006. At the time of the accident, the Plaintiff was an 8-year-old student who took Putonghua lessons at a tuition centre of which the 2nd Defendant was the sole proprietor.
2. The Plaintiff’s case was that it was the 2nd Defendant’s duty to take the Plaintiff home after the lessons. On the afternoon of 26th August 2006, the Plaintiff was taken home by the 1st Defendant, who was the sister and employee of the 2nd Defendant. After alighting from a taxi, however, the 1st Defendant left the Plaintiff unaccompanied and unsupervised, in consequence of which he was struck and injured by a goods vehicle when he crossed the road by himself.
3. The writ in this action was issued on 20th December 2006, which however was not served on the Defendants until 14th June 2007. The 1st Defendant applied for legal aid on 21st June 2007 to defend the action.
4. The Director of Legal Aid (‘the Director’) however refused her application by a memorandum dated 29th August 2007. Subsequently, as the 1st Defendant did not file an acknowledgment of service, interlocutory judgment in default of notice of intention to defend was entered against her on 6th September 2007 (‘the default judgment’).
5. On 11th December 2007, the 1st Defendant issued the present summons to apply to have the default judgment set aside.

# Regular Judgment

1. It is clear on the evidence that the default judgment was a regular judgment.

# Meritorious Defence

1. Since the default judgment was a regular judgment, it is incumbent upon the 1st Defendant to give a satisfactory explanation as to why she has allowed judgment to go by default and to show that she has a defence to the Plaintiff’s claim with a real prospect of success.
2. By her affirmation filed on 11th December 2007, the 1st Defendant explained that she had in fact prepared a document setting out her defence to the Plaintiff’s claim (‘Grounds of Defence’), which she had forwarded to the Director in support of her application for legal aid. A copy of the Grounds of Defence dated 22nd August 2007 has been exhibited to her affirmation.
3. She further explained that it was her understanding that the Director would file her Grounds of Defence into the Court on her behalf. And it was not until the middle of October 2007 that she realized that the Director had not done so, in consequence of which the default judgment was entered against her.
4. Miss Monica Chow who appeared on behalf of the Plaintiff pointed out that there is evidence that the 1st Defendant had access to legal advice and assistance from the 2nd Defendant’s lawyers shortly before she took out the present summons, ie on or about 10th December 2007. I agree.
5. However, the relevant time is August and September 2007 and there is no evidence that she then had the benefit of legal advice and assistance.
6. The 1st Defendant was then not legally represented. She was not familiar with court procedure. She did prepare the Grounds of Defence setting out her defence to the Plaintiff’s claim. I accept her explanation that she made a genuine mistake in thinking that the Director would file her Grounds of Defence into Court on her behalf.
7. It should also be pointed out that it was almost 2 months from the time the 1st Defendant became aware of the default judgment to the time she took out this application. I accept however that she was not familiar with court procedure until she had the benefit of legal advice from the 2nd Defendant’s lawyers, whereupon she immediately took out this application. I am also satisfied that no injustice has been occasioned to the Plaintiff in the conduct of this action by such delay.
8. In the Grounds of Defence, the 1st Defendant stated her version of how the accident came to happen. After she alighted from the taxi, she was holding a $10 coin in her right hand, and she was holding the right arm of the Plaintiff with her left hand. Then the $10 coin fell from her right hand, whereupon she squatted to pick it up, and she temporarily let go of the Plaintiff’s right arm. At this juncture, the Plaintiff suddenly ran out into the road and was struck by a goods vehicle. She denied that she was negligent in failing to look after the Plaintiff properly.
9. Insofar as liability is concerned, the ultimate outcome in this case would depend on whose evidence is believed. I am satisfied that on the matters set out in the Grounds of Defence, the 1st Defendant’s case is potentially credible, carries some degree of conviction, and could well be established at trial.
10. In the circumstances, I am satisfied that she has a meritorious defence to the Plaintiff’s claim, both as to whether she was negligent and as to whether the Plaintiff was contributorily negligent.
11. Taking the foregoing matters into consideration, I exercise my discretion to set aside the default judgment and give leave to the 1st Defendant to defend the action. She is to file a Defence within 14 days from the date hereof. The Plaintiff is to file a Reply, if so advised, within 14 days thereafter.

# Costs

1. I make an order nisi that the 1st Defendant do pay the Plaintiff’s costs of this application in any event to be taxed if not agreed, with a certificate for counsel, and that the Plaintiff’s own costs be taxed in accordance with legal aid regulations. Unless an application is made to vary it, this costs order shall become absolute 14 days from the date thereof.

Ronald Tang

Deputy District Judge

Miss Monica Chow, instructed by Messrs Fan & Fan, for the Plaintiff

The 1st Defendant appeared in person.