#### DCPI2700/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2700 OF 2007

BETWEEN

KWOK YIM KWAN Plaintiff

and

CARNIVAL SEAFOOD Defendant

RESTAURANT LIMITED

##### Before: H H Judge Lok in Court

Date of Hearing: 10 & 11 September 2008

Date of Judgment: 11 September 2008

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## J U D G M E N T

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1. This case is about a trip-and-fall accident in a Chinese Restaurant.

###### Background of the case

1. The accident occurred at about 9 pm on 30 June 2007. The Plaintiff was a customer inside the restaurant operated by the Defendant at portion of 1st floor and whole of 2nd floor of Tropicana Garden, 110 Lung Cheung Road, Wong Tai Sin, Kowloon (“the Restaurant”). There was a special decorated Room inside the Restaurant (“the Room”). The floor of the Room was constructed in an elevated platform and there was a step between the main floor of the Restaurant and the Room itself. The floor of the Room was about 3 to 4 inches higher than the main floor of the Restaurant.
2. On the night in question, the Plaintiff and her family members were led to sit at a table inside the Room. In the course of the dinner, the Plaintiff left her seat and intended to go to the ladies toilet. When she left the Room at one of the entrances, she tripped at the step and fell onto the floor of the Restaurant. As a result, the Plaintiff’s right foot was injured.
3. The Plaintiff claims that the Defendant was both negligent and in breach of occupiers’ liability in causing the accident by, *inter alia*:

(i) failing to warn the Plaintiff of the existence of the step;

(ii) failing to put an illuminating yellow or white line at the edge of the Room;

(iii) failing to differentiate the colour of the edge of the Room and the corridor leading to the ladies toilet;

(iv) failing to remove the step by providing a gentle slope connecting the respective floor levels of the Room and the corridor; and

(v) causing the Room to be constructed in a way where there was a hidden danger in the step.

1. The parties agree the quantum of the Plaintiff’s claim in the sum of $175,000 inclusive of interests, and the remaining issue is therefore one of liability.
2. The Plaintiff herself testifies at the trial. According to her, she had been the patron of the Restaurant on a number of occasions. On the day of the accident, it was the first time that she sat at a table inside the Room. She entered the Room at Entrance No.3 as shown in the floor plan of the Restaurant, a copy of which is included in page 114 of the trial bundle. At that particular entrance, the colour of the floor tiles of the Room near the edge and the colour of the carpet on the main floor of the Restaurant were quite different, and so she noticed the step when she entered the Room. After staying in the Room for about one odd hour, she left her seat and went to the toilet through Entrance No.1 as shown in the floor plan. When she approached that entrance, she found that the floor of the Room was level with the floor of the corridor. By stepping her foot in the false landing, she tripped and injured her right foot. By that time, she forgot that there was a step when she entered the Room via another entrance.
3. The Plaintiff has lost the eyesight of her right eye since birth. However, she has no problem in using her left eye to take care of her daily activities.

Observations made at the site visit

1. The parties took some photographs about the various entrances of the Room. However, as the photographs are only two dimensional in nature, Mr Wong, counsel for the Defendant, invites the court to conduct a site visit of the Restaurant. I agree with Mr Wong’s suggestion, and in fact I find that the site visit is useful in helping the court to understand the conditions of the various entrances of the Room.
2. Except whether there was a fluorescent tube at the base of the step at the material time, the parties agree that the condition of Entrance No.1 at the site visit is more or less the same as that on the day of the accident. This certainly makes the task of the court much easier.
3. I can therefore set out my observations made at the site visit.
4. Firstly, the Room was about 3 to 4 inches higher than the main floor of the Restaurant and there was a glass partition separating the two areas.
5. Secondly, the colour of the floor tiles of the Room near the edge of Entrance No.3 (the entrance used by the Plaintiff in entering the Room) is quite different from that of the colour of the carpet of the Restaurant in that area (as shown in the photographs in pages 129 and 130 of the trial bundle), and so one should not have too much difficulty in noticing the step when he or she is entering or leaving the Room using that entrance.
6. Thirdly, the condition at Entrance 1 (the location of the accident) is quite different. The colour of the floor tiles of the Room near the edge of the entrance is very similar to the colour of the floor of the corridor in that part of the Restaurant. There is a strip of black tiles of about 5 inches wide on the floor of the corridor at the border of the step (as shown in the photographs in pages 74, 84 to 87 of the trial bundle). The colour of that strip of black tiles is slightly different from the colour of the floor of the corridor and the floor tiles of the Room near the edge of Entrance 1.

1. Fourthly, when entering the Room at Entrance 1, one can easily notice the step because of the presence of the strip of black tiles and the white paint near the bottom of the step. Further, the step is clearly visible from that direction (as shown in the photographs in pages 74, 85 to 87 of the trial bundle).
2. Fifthly, the situation is very different when one is leaving the Room in the opposite direction via Entrance No.1. At a distance of about 6 feet from the step, one cannot see the step and the strip of black tiles in the corridor. As the colour of the floor tiles in the Room near the edge is very similar to that of the floor tiles in the corridor, it gives a false impression that the Room is level with the corridor (as shown in the photographs in pages 75, 99 (the top one), 118 and 126 of the trial bundle). This is particularly the case with the same degree of light reflection from the two surfaces (as shown in the photographs in page 126 (the bottom one) of the trial bundle). However, if a patron approaches the step within a distance of 6 feet, he may start to notice the presence of the strip of black tiles which may alert him about the presence of the step.
3. There is no dispute that there was no notice or other sign warning the patrons about the presence of the step at Entrance No.1.

###### Liability of the Defendant

1. Based on these observations, I have no doubt in finding that the Defendant was negligent in the present case. As the patrons leaving the Room cannot see the step and the floor level of the Room is only a few inches higher than that of the main floor of the Restaurant, the step, in my judgment, constituted a trap to all the patrons of the Restaurant. This was particularly the case as the colour of the floor tiles of the Room near the edge of the entrance was very similar to that of the corridor, giving a false impression to visitors that the floors of the Room and the corridor were level. A reasonable man should therefore foresee that there is a real risk that a visitor of the Restaurant would trip on the step when leaving the Room via that passageway, and the Defendant should have taken at least one or more of the measures alleged by the Plaintiff to remove the danger involved, including the posting up of clear written warnings, the putting of an illuminating yellow or white line at the edge of the Room, the using of very different floor tiles to differentiate the floors of the two split levels, the provision of a passageway with gentle slope instead of a step or removing the split levels altogether. These measures were clearly reasonable in the circumstances taking into account the magnitude of the danger, the risk posed and the likelihood of the risk concerned.

1. Mr Wong submits that there have been no reported accident with the use of the steps in the various entrances of the Room since the operation of the Restaurant in 2004. The magnitude of the risk of injuring oneself by tripping at the step is therefore so small that the law should not expect the occupier of the Restaurant to do anything about the same. I disagree. The magnitude of risk of the danger involved is a matter for the court to determine, taking into account the general surroundings of the Restaurant and the possible visitors of the premises. The Defendant might be lucky in the past with no reported incident, but that does not in any way reduce the risk of the danger involved. Further, Mr Yuen, the manager of the Defendant, agrees that he may not be aware of all the incidents in the Restaurant even if ambulances had been called to take away sick or injured customers in the Restaurant. In such circumstances, it was possible that patrons had in fact tripped on the steps in the past. As no legal action has been filed, Mr Yuen may not be aware of such incidents. Hence, this factor cannot assist the defence case.
2. Mr Wong also refers me to a number of decided cases involving slip-and-fall accidents, including *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Limited trading as The Excelsior,* unreported, CACV38/2000 (decision on 22 November 2002), and *Laverton v Kiapasha trading as Takeaway Supreme* [2002] EWCA Civ 1656 (19 November 2002)*.* According to him, these cases establish that visitors of premises are expected to exercise reasonable care for his own safety, and it is not reasonable to require the occupier to guard against all the risks involved in the use of the premises.
3. However, most of these cases relate to the presence of water or oily substance on the floor. No matter how careful the occupier was, one cannot expect him to guard against the presence of water or oily substance at all times. The present case is quite different. The risk was there and obvious. Further, as I have mentioned above, the conditions of the passageway gave a false impression to the visitors that the floors of the Room and the corridor were level. If the general surroundings gave such an illusion to the patrons, it was the duty on the part of the Defendant to remove the danger involved.
4. Mr Wong also relies on the case of *Phillis v Daly* [1988] 15 NSWLR 65 and asks the court to take into account the environmental considerations and aesthetic factors in considering the issue of liability. However, even if the Defendant wanted to keep the split levels as a matter of the design of the Restaurant, it did not in any way reduce the risk of the danger involved in using that passageway. In any event, the Defendant could have discharged the duty by taking appropriate steps, including the posting of adequate notices and signs warning the patrons about the presence of the step, and yet the Defendant had failed to take any of these measures to reduce the danger involved, and so, in my judgment, the Defendant is clearly liable in negligence and breach of occupiers’ duty.
5. It is true that the Plaintiff has lost the eyesight of her right eye since birth. However, as the danger of using the step was obvious to any patron with no such disability, and there is no evidence to show that the loss of eyesight had in any way affected the Plaintiff’s judgment about the general surroundings of the passageway, I do not think that the Plaintiff’s disability is relevant in the determination of liability in the present case.
6. There is a factual dispute between the parties as to whether there was a fluorescent tube at the base of the step on the day of the accident. However, I do not find that the presence of the alleged tube in any way assists the Defendant’s case. Firstly, the tube was allegedly installed at the base of the step, and so it would not have been visible to someone leaving the Room from the opposite direction. That was exactly what the Plaintiff was doing at the time of the accident. Secondly, even if the fluorescent tube was there and operating normally at the material time, there is no evidence before the court to show that the light produced by the tube would have been sufficient to alert a patron leaving the Room about the presence of the step. In particular, Mr Yuen of the Defendant agrees that the tube was only a tiny one. Hence, the alleged presence of the tube does not add any weight to the Defendant’s case.
7. Further, the photographs taken by the Plaintiff’s husband shortly after the accident do not support the presence of the fluorescent tube at the base of the step at the material time (see the photographs in pages 73 to 75, 98 to 100 of the trial bundle). Mr Yuen of the Defendant claims that the tube had been removed in March 2008, but the present action was commenced in December 2007. In such circumstances, it would only have been reasonable for the Plaintiff to take some photographs of the site in question before commencing any legal action. Hence, I have every reason to believe that these photographs were taken by the Plaintiff’s husband shortly after the accident, and I therefore reject the Defendant’s evidence about the presence of the fluorescent tube at the time of the accident.

###### Contributory negligence

1. I also do not find that the Plaintiff was guilty of contributory negligence in the present case. As I see it, there are only two possible arguments about any contributing negligence on the part of the Plaintiff. Firstly, being a patron of the Restaurant on a number of occasions and noticing the step when she entered the Room via Entrance No.3 earlier that evening, the Plaintiff should have known that there was a step in Entrance 1 when she used that passageway to the toilet. Secondly, although the Plaintiff might not have noticed the split levels at a distance of about 6 feet from the entrance, she should have seen the strip of black tiles at the corridor when she approached the entrance within a distance of 6 feet. The presence of the strip should have alerted the Plaintiff about the existence of the step.
2. However, the evidence clearly shows that the Plaintiff was sitting at a table inside the Room for the first time on the day of the accident. As the floor of the Room was only a few inches higher than that of the main floor of the Restaurant, one would not be aware of the split levels after sitting in the Room for quite some time. Further, being an infrequent visitor of the Restaurant, one should not expect the Plaintiff to remember all the hidden dangers in the Restaurant. Lastly, even if there were split levels in the entrance she used earlier, that did not necessarily mean that there were also split levels in another entrance. The Plaintiff had to trust her own perception about the condition of Entrance 1 at the material time. As general surroundings gave a false impression to the Plaintiff that there was no step in the passageway, the Plaintiff was not careless at the time of the accident.
3. Regarding the strip of black tiles, I have already mentioned that when one stood at a distance of about 6 feet from the entrance, one would have a false impression that there were no split levels in the Room and the corridor. Without aware of the danger involved, the Plaintiff continued to walk and tripped on the step. In my judgment, this was actually what a normal person would have behaved in the circumstances. When we walk, we would focus generally on the surroundings in front of us rather than on the ground immediately in front of us. When we perceive that there is a danger, for example, approaching a step, then rather than focusing on the general surroundings in front of us, we start to focus on the floor or the ground immediately in front of us. At the time of the accident, it was clear that the Plaintiff did not perceive any danger in front of her, as she reasonably got the false impression that there were no split levels in the passageway. In such circumstances, the Plaintiff should not be criticized for failing to notice the strip of black tiles immediately in front of her when she approached the passageway.
4. By reason of the aforesaid, I find that the accident was caused wholly by the negligence and the breach of occupiers’ liability on the part of the Defendant. As the parties agree the quantum of the Plaintiff’s claim in the amount of $175,000 inclusive of interests, I grant judgment in favour of the Plaintiff for the said sum.

# (David Lok)

# District Judge

Mr Andy Lam, instructed by Messrs Ivan Tang & Co., for the Plaintiff

Mr Charles Wong, instructed by Messrs Lau, Chan & Ko, for the Defendant