#### DCPI 2738/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2738 OF 2009

BETWEEN

CHEUNG KWOK KEUNG Plaintiff

and

YIP MAN HING BUILDING MATERIALS 1st Defendant

COMPANY LIMITED

YUEN SUK FAN 2nd Defendant

LO YUET WAH 3rd Defendant

LO FUNG LIN 4th Defendant

LAW KAU 5th Defendant

##### Coram: Deputy District Judge Kent Yee in Court

Dates of Hearing: 28-30 November 2011 and 1-2 December 2011

Date of Judgment: 3 January 2012

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## JUDGMENT

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###### INTRODUCTION

1. This action arises out of an accident which took place at about 3:00 p.m. on 5 February 2007 (“the Accident”). The plaintiff Cheung Kwok Keung (“**Cheung**”) sustained hip injury after falling onto the ground at an open area owned by the 3rd, 4th and 5th defendants (collectively “**Other Defendants**”). The open area was a part of the land known as Lot No. 623 in D.D. No. 9, Tai Po (“Land A”). Lot 623 was then occupied by the 1st defendant Yip Man Hing Building Materials Company Limited (“**YMH**”) for open storage purpose.
2. A dog called “Dor Dor” (Chinese name: 多多), a male boxer was involved in the Accident. The 2nd defendant Yuen Suk Fan (“**Yuen**”) is the owner and keeper of Dor Dor. Yuen and her family occupied Lot No. 624 in D.D. 9 (“Land B”). Dor Dor was leashed and tied to a metal pole at the backyard of Land B but managed to escape from Land B and entered Land A. In the course of moving away from Dor Dor, Cheung fell and was injured.
3. Cheung brought these proceedings against YMH, Yuen and the Other Defendants for damages for his personal injuries. All of them deny liability, raise the issue of contributory negligence and argue that the damages claimed by Cheung are exaggerated.

BACKGROUND

1. To understand Cheung’s claim, it is necessary to set out the *dramatis personae* and go further into details about the undisputed background facts.
2. The 5th defendant Mr. Law Kau (“**Law**”) is now 89 years old. Both the 3rd defendant Ms. Lo Yue Wah (“**Wah**”) and the 4th defendant Ms. Lo Fung Lin (“**Lin**”) are Law’s daughters. Wah was married to Mr. Yeung Ka Yung (“Yeung”). Lin was married to Mr. Ho Yuet Por (“Ho”).
3. YMH is essentially a business vehicle used for a family business carried on by the Law’s family. Initially Law held 70% of the shares in YMH with the remaining 30%. Some years ago Law transferred 10% shares to Lin. At the material time, Law, Yeung and Lin were the 3 shareholders of YMH holding 60%, 30% and 10% shares respectively. Law and Yeung were the only directors of YMH.
4. The office of YMH (“the Office”) straddled on Lot No. 625 and Lot No. 627 in D.D. 9. It carried on the business in the trade of building materials (both wholesale and retail).
5. At the material time, Law, Yeung, Lin and Ho were involved in the business of YMH. Lin and Ho were employed by YMH. Wah only joined in February 2009.
6. In or about May 1993, Law together with one Mr. Law Kam Hin (“Hin”) and one Mr. Tsang Yuen Hong (“Hong”) acquired a few lots of land within D.D. 9 including Land A, Land B, Lot Nos. 625 and 627 as tenants in common in equal shares. In June 2005, Hin assigned his interest in all such lands to Lin and Hong assigned his to Wah.
7. All of the lands in D.D. 9 presently owned by Law, Wah and Lin (collectively “the Lands”) are enclosed by metal fence. The total area of the Lands is about 40,000 square feet. They share the same address known as 133 Nam Wa Po, Tai Po, New Territories. There are two entrances to the Lands. One is for vehicles and is on Tai Wo Service Road West with a metal gate (“Gate A”). The other one is for pedestrians with a smaller metal gate (“Gate B”).
8. Since the Lands were acquired by Law *et al*, the business of YMH has been carried on there (except Land B) and principally in the Office. All the open spaces including Land A were used as open storages.
9. Land B, about 1,500 square feet in area, is sandwiched by Land A and Lot No. 625. Land A was about 40-50 feet away from the Office in Lot No. 625. It was covered with rubble.
10. Since about 1983, Land B has been leased to Yuen’s husband Mr. To (“To”), who is a member of the police force. There is a house which is 27 square metres in area for residential purpose. The remaining area is used for gardening and there is a backyard of the Yuen’s family. To, Yuen and their son have stayed there throughout the years.
11. At the material time, the Yuen’s family resided at Land B under a tenancy evidenced by a written lease entered into between YMH as landlord and To as tenant. It was from 1 Janaury 2006 to 31 December 2008 and the yearly rent was HK$2,400. All along Yuen kept dogs at Land B and at the material time, Yuen kept 4 dogs including Dor Dor.
12. From the photographs of the backyard of Land B, it can be seen that Land B is separated from Land A only by thick shrubs and trees. There was an opening between two blocks of concrete of about 1.5 feet tall whereon shrubs and trees were grown. The opening was blocked by a movable wire mesh gate with a height of 3 feet and a width of 4 feet (“the Gate”). The Gate was installed by Yuen herself using simple homemade devices including wires in mid 2006.
13. On the material day, Cheung first drove to the Office with certain passengers and a sale transaction was completed. Then, Cheung drove from the Office to Land A to collect the building materials just purchased, which were known to be granolithic concrete (石米). On Land A, his van was parked just outside the Gate. For some time, he was standing alone and he saw Dor Dor behind the Gate.
14. At the time of the Accident, Dor Dor was about 4.5 years old weighing 25 kg. It was 0.4 metre tall and 0.5 metre long.
15. After the Accident, Dor Dor was not detained by the Agriculture, Fisheries & Conversation Department (“the AFC Department”) after their investigation. No criminal prosecution was instituted as a result of the Accident.

PARTIES’ PLEADED CASE

*Cheung’s Case*

1. Cheung sues all the defendants in negligence and additionally for YMH, Wah, Lin and Law under the Occupiers’ Liability Ordinance, Cap. 314 (“the OLO”). He does not rely on the doctrine of scienter.
2. The major complaints of negligence against all the defendants except Yuen (both in common law and under the OLO) are that they failed to maintain Land A a safe place for their lawful visitors including him, keep any adequate warning to their lawful visitors and take any adequate precaution and/or attention to prevent or guard against Dor Dor from entering Land A when Cheung was present on Land A.
3. The complaints about Yuen include her failure to prevent Dor Dor from entering Land A by ensuring that (1) it was securely tied or confined, (2) Dor Dor’s neck chain would never become loosened by paying proper attention to Dor Dor. As a result, Dor Dor came out and eventually pounced upon Cheung causing him to fall and get injured.
4. In the Amended Statement of Claim, there is a plea made under the Summary Offences Ordinance, Cap. 228. Ms. Liu, counsel for Cheung, in her opening submission, confirmed that Cheung no longer relied on this plea.

*YMH and Other Defendants’ case*

1. These defendants say that Dor Dor is a friendly and docile dog and is not a dangerous or fighting dog within the meaning of the Dogs and Cats Ordinance, Cap. 167.
2. The Other Defendants deny that they were occupiers of Land A while YMH agrees that it was. They contend that Land A was safe for its lawful visitors. They further contend that Cheung was allowed to enter and remain on Land A for the purpose of taking delivery of the building materials just purchased only and he was safe on Land A for this purpose. Cheung became a trespasser when he teased and provoked Dor Dor. Cheung continued to tease and provoke Dor Dor despite the warning/advice/plea made by Lin and other people.
3. YMH and the Other Defendants thus say that the Accident was a result of Cheung’s mischief and/or negligence and he should be solely or largely responsible for his injuries.

*Yuen’s case*

1. Yuen’s case is that she has discharged her duty as the keeper of Dor Dor and has taken reasonable care to avoid any damage possibly caused by Dor Dor. Dor Dor has had no history of attacking or attempting to attack any visitors of YMH, who are present on a daily basis, since it was kept at Land B in March 2004. Prior to the Accident, she had received no complaint about Dor Dor.
2. Moreover, Dor Dor was kept and confined at Land B by a metal chain surrounding its neck which was connected by a buckle to a steel leash of about 10 feet long behind the Gate. She could not have expected Cheung’s teasing and provocation of Dor Dor notwithstanding warnings and advice. She could not have expected Dor Dor would then break free from the steel leash and entered Land A. She says that the Accident was partially if not solely caused by Cheung and on that basis there should be contributory negligence on the part of Cheung.

ISSUES

1. The liability of the defendants, or the absence of it, very much turns on how the Accident occurred. The major issues calling for resolution are as follows:
2. Did Cheung do anything to Dor Dor before it entered Land A?
3. How did Dor Dor entered Land A?
4. What did Dor Dor do to Cheung after it entered Land A?
5. Was the injury sustained by Cheung caused by Dor Dor?
6. Who was/were the occupier(s) of Land A at the material time?
7. Did such occupier(s) failed in their duties under the OLO and/or were they negligent?
8. Was Yuen negligent in failing to prevent Dor Dor from entering Land A?
9. Obviously, issues (6) and (7) are mixed questions of fact and law and they very much turns on the findings of issues (1), (2) and (3).

**LIABILITY**

THE PLAINTIFF’S EVIDENCE

*Cheung*

1. Cheung was born in the Mainland and came to Hong Kong in 1972. He was a married man with 3 children. At the material time he was self-employed as a delivery worker with his van. He could be employed as a driver only but he could also undertake delivery work as well.
2. On the material day, he received an order to drive one Mr. Hung with his staff to go to the Office to purchase building materials. He had been to the Office twice or thrice beforehand. He knew that Dor Dor resided at Land B and he had previously seen it trying to break free from its neck chain by pulling the same violently upon seeing visitors on Land A. Cheung said Dor Dor was a extremely fierce dog to him. He emphasized that he dreaded dogs and he was minded to give Dor Dor a wide berth.
3. When Cheung’s van reached the Office, only Mr. Hung and his staff went inside the Office to transact business and he stayed in his van. Then they returned to the van and Cheung drove them to Land A. On Land A, the staff of YMH would place the granolithic concrete purchased into the van.
4. Cheung parked his van about 3 metres away from the Gate. Mr. Ho and his staff went to the washroom which was around 20 metres away. Cheung got out of the van for stretching. He shut all the doors of the van and stood between the van and the Gate. There was nothing standing between him and the Gate. He saw that there was a sign with some red characters painted thereon hung on the Gate but he could not tell what those characters were.
5. After waiting for about 5 minutes, Cheung came to notice that Dor Dor was behind the Gate when it attempted to break the neck chain forcefully. Seconds later, it succeeded and it came out from Land B and entered Land A. Dor Dor did not bark or growl throughout.
6. Cheung was scared when Dor Dor walked slowly towards him. He kept his eyes on Dor Dor and walked backwards slowly. All along Dor Dor neither barked nor growled and kept a constant distance of about 4.5 feet away from Cheung with a firece look. After at least 1.5 minutes, he reached some building materials on his back and could not walk backwards any further. He stopped but Dor Dor immediately pounded upon him. He tried to ward Dor Dor off with his waistbag. Though he prevented Dor Dor from attacking him, he lost his balance and fell onto the ground.
7. Then a middle-aged woman appeared and screamed that Dor Dor bit people again (“隻狗又咬人啦”). She picked up small stones on the ground and threw them towards Dor Dor to scare it off. It then went back to Land B.
8. Cheung was in great pain and was immobile. One of the persons he drove to the Office and Land A known as Mr. Sy assisted him to get up but in vain. Yuen came back and called the police. Afterwards, Cheung was sent to the hospital for treatment by an ambulance.

*Sy Ying Kit (“Sy”)*

1. Sy made a witness statement but 2 days before the trial he made an “amended witness statement” with certain deletions of the contents of his witness statement. The application for leave to file the amended witness statement made at the outset of the trial was unopposed and hence leave was granted with costs to the defendants.
2. Sy said he was not employed by Mr. Hung. He just went along to the Office with Mr. Hung and his 2 staff members as he was free. He added that before reaching the Office, Cheung already advised that there was a fierce dog inside the premises of YMH. Cheung warned them not to wander around the premises and they should go straight into the Office.
3. He recalled that on Land A, he was checking out the building materials with a staff member of YMH and some staff of YMF were loading packets of granolithic concrete onto the van. After 6 to 7 minutes, he heard Cheung scream. Before then, he heard no barking and found nothing unusual. He turned around and saw Cheung falling backwards with one of his hands raised with his waistbag. He was only about 10 odd steps away from Cheung. He saw Dor Dor sitting right by Cheung and when a male staff of YMH shouted at it, it walked away.

THE DEFENDANTS’ EVIDENCE

*Ho*

1. Ho testified on behalf of YMH. Since 1994, he worked for YMH without any formal title. He helped out in the business operations. Wah only started working for YMH in 2009 as a salesperson. Ho knew no previous accident involving Dor Dor after its arrival at Land B in 2004.
2. On the material day, he saw Cheung with 2 other males went to the Office and transacted business. After payment, Cheung went back to his van and proceeded to Land A where some of the purchased building materials were being stored. Ho went to Land A to assist loading such building materials onto the van.
3. Whilst Ho was working with the two males arriving with Cheung, Cheung was standing in front of the Gate, about 6 feet away. He teased Dor Dor by making gestures and growling sound. Dor Dor was agitated and moved from one side to another. All of Ho and the two males then warned Cheung not to tease or provoke Dor Dor but Cheung ignored them. Cheung even squatted down and picked up some sands or stones from the ground and threw them towards Dor Dor. The provocation lasted for a few minutes.
4. Dor Dor was even more agitated and eventually managed to pulled off the steel leash. It squeezed out from the right side of the Gate and entered Land A. Cheung continued to throw sands or rocks towards Dor Dor. Dor Dor did not react at all and just stood still. Cheung was scared and kept walking backwards. After about walking a distance of about 12 feet, Cheung fell onto the ground and Dor Dor never approached Cheung.
5. In cross-examination, he added that Lin told Cheung not to tease Dor Dor before it entered Land A. This was inconsistent with his evidence in chief that Lin only arrived in Land A after the Accident. He could not explain why there was such a discrepancy. Nor could he explain why he did not mention Lin’s involvement at all in his witness statement.
6. Lastly, Ho pointed out that Sy was not present on Land A on the material day at all. Ho said so on the basis that he could not recognise him when he saw Sy testifying through the glass panel on the door of the courtroom for a while.

*Yuen*

1. Yuen started doing work for YMH in 1994 and she has been paid a salary of HK$1,500 per month throughout the years. She started handling clerical tasks for YMH such as issuing invoices in 2005.
2. To and Yuen adopted Dor Dor in March 2004. The original registered owner was one Mr. Ng and according to the registration certificate dated 11 October 2002, Dor Dor was 5 months’ old then. Mr. Ng was a friend of To and as Mr. Ng was about to move to a smaller home, he had to give up Dor Dor. To agreed to adopt it. When Dor Dor arrived at his home, Yuen found it a very quiet and gentle dog. Dor Dor had never exhibited any aggressive behaviour.
3. Yuen had the key to the Gate B but not Gate A. In or about 1994, she put up a warning sign of “內有惡犬” at both Gates A and B to avoid trespassers. Further, Yuen installed the Gate in mid 2006 for two reasons. First, it was to prevent visitors of YMH from taking a short cut from the Office to Land A by walking through Land B. Second, it was for security reasons as she found out that her papaya at the backyard had gone missing.
4. The Gate could be opened by pulling inward from the inside of Land B. It was not the usual entrance/exit and Yuen would use the Gate only when she walked her dogs in the morning every day. Also, after the office hours of YMH, Yuen would open the Gate and unleashed all her dogs so that the dogs could have fun and walk freely within the Lands. The dogs would normally return to Land B the morning after. When they were at Land B, they were invariably leashed and tied securely within Land B.
5. She explained in detail how the Gate was installed and kept in place. Looking from Land B, the right side of the Gate was fixed and tied to a metal pole erected from the ground. Its left side was behind a concrete whereon a leafy bamboo palm was grown. From the bole of the bamboo palm, which was about 8 inches away from the left side of the Gate, there extended a wire hooking onto the Gate. Thus, the Gate could be opened from the left by removing the wire and pulling it inward.
6. On the material day, as usual, Yuen walked her four dogs in two batches in the morning. After they returned to Land B, they were leashed. For Dor Dor, there was always a metal chain around its neck with a buckle and it was connected to another 10-foot steel leash inside Land B. When Yuen took it out for a walk, Yuen would first change the 10-foot steel leash to a leather leash.
7. Yuen did not find anything untoward on that day. Nothing caused her any concern about the metal chain, the leashes and the buckle. She left home at around 2 p.m. and returned home a few hours later. Before leaving home, she patted Dor Dor on its head and found the neck chain and the steel leash were in good order.
8. When she reached Land B, she saw a man (later known to her to be Cheung) sitting on the ground of Land A. The Gate was still locked but its left side was tilted onto the concrete. She pulled open the Gate and walked towards Cheung (about 60 feet away from the Gate). Ho was also there and Ho told her that Cheung had provoked a dog and fell down. She asked Ho if he had called the police but he just walked off. She then called the police for assistance.
9. When she returned to Land B, she saw Dor Dor lying on the ground and noticed that its leash was detached from its neck. She found out that the contact point of the buckle and the steel leash was separated.
10. As regards the warning sign posted next to the the Gate, it was posted only after the Accident and first it read “內有勇犬”. After receipt of the Writ herein, she replaced the sign with the present one which reads “內有惡犬”.

*Lin*

1. Lin’s evidence in her witness statement was almost identical to those of Ho, her husband. She used to work as a restaurant worker and later joined YMH in 2004. Since 2004, she had worked 6 days a week from 8:30 a.m. to 5:30 p.m. for YMH. She had never seen Dor Dor walking unleashed outside Land B and had never heard any complaints about Yuen’s dogs.
2. On the material day, she saw Cheung with two other persons entering the Office after parking the van outside the Office. She did not get into the Office and she merely saw Cheung making payment at the front desk. All three of them then left the Office and got back onto the van. Cheung drove to Land A to collect the building materials he had just purchased. She then followed Ho to walk to Land A to help out.
3. When she and Ho reached Land A, the van was there and the three men had already got out of it. Whilst Cheung was close to the Gate, Ho and the two men were loading some building materials onto the van. Lin usually assisted in such manoeurve but this time she did not. Cheung was only 1 or 2 feet away from the Gate and she was about 8 or 9 feet away from the Gate on the right side of Cheung’s back. She saw Cheung teasing and provoking Dor Dor by making gestures and growling sound. Cheung also picked up some sands and stones from the ground and threw them towards Dor Dor 3 or 4 times. All Ho and the other two males asked him to stop but he ignored them.
4. She heard Dor Dor barking once or twice and then it growled for a few seconds. It started to struggle and attempted to escape. She could not tell how exactly Dor Dor managed to squeeze through the Gate and enter Land A. When Dor Dor came out, it stood still and looked at Cheung. It then walked about 4 feet towards Cheung.
5. Cheung walked backwards and he fell when he was about 18 to 20 feet away from Dor Dor. Dor Dor did not pounce upon Cheung. In cross-examination she denied having shouted that Dor Dor again bit people. She also denied having thrown anything towards Dor Dor to scare it off after Cheung fell.
6. In cross-examination, she explained that the Lands were purchased for the business of YMH with a sitting tenant in Land B. There was no tenancy agreement signed and YMH did not need to pay any rent.

*Law and Wah*

1. Both Law and Wah did not testify despite having filed their witness statements. Both of them did not witness the Accident at all. Medical evidence of Law shows that he is in poor health. I shall not make any inference from their absence at trial.

ANALYSIS AND FINDINGS

1. As a general observation, neither Cheung nor Sy impressed me as a truthful and reliable witness. On the contrary, Yuen and Lin were honest witnesses making a genuine effort to tell the truth. Their accounts were logical and their answers in cross-examinations were both spontaneous and straightforward. I am left in no doubt that I should prefer their evidence to that of Cheung and Sy in case of conflict.
2. As regards Ho, he sounded non-committal and uncertain at times. I am reluctant to rely on his evidence generally. In particular, I refuse to accept his assertion that Sy was not present when the Accident occurred at all.
3. Cheung sought to make this court believe that Dor Dor was a firece dog and he dreaded it even before the material day. That would negate the allegation that he would be so playful that he had provoked Dor Dor. I do not accept his evidence in this respect.
4. First, there was no reason why he would allow himself to stand so close to the Gate on his own for 5 minutes if he feared Dor Dor. He claimed to have seen Dor Dor reacting violently behind the Gate upon seeing strangers previously. If he needed to do some stretching after driving for a while as he claimed, he could simply do so in his van with the driver door open. Even if he really needed a 5-minute stretching exercise on the ground despite the presence of Dor Dor, he could have done so on the other side of the van to avoid facing Dor Dor at close range. In fact he did not say that he stretched throughout the 5 minutes when he waited for his people beside the van. He should also have left the van door open and have been on the alert against Dor Dor too.
5. I cannot believe that Dor Dor suddenly pounced upon Cheung after Cheung had walked backwards continuously for at least 1.5 minutes. Obviously, Cheung should have some concern about his safety after Dor Dor broke free from its steel leash and entered Land A. Yet, I could not believe that Cheung kept walking backwards for so long with Dor Dor approaching him slowly. Within 1.5 minutes, to avoid Dor Dor, Cheung had ample time and chance to return to the van, which he claimed was parked only 3 odd metres away from the Gate and/or do other things to avoid Dor Dor.
6. After the Accident, for the purpose of these proceedings, on or about 24 March 2010, Cheung and his friend went to Land A again to take some photographs of Land B and Dor Dor. Dor Dor was depicted and it was lying behind the Gate. Cheung and his friend were only a few metres away from the Gate. When asked why he was not afraid of Dor Dor rushing onto Land A after the traumatic experience in the Accident, he explained that he noticed that the Gate was locked. In the first place, it was extraordinary that he had this obversation bearing in mind the Gate was not locked by a big pad lock but only by wires behind the bamboo palm. In the Accident, before he was allegedly attacked by Dor Dor, Dor Dor managed to escape from the Gate which was also locked. Therefore, even if he saw the Gate being locked, his fear of Dor Dor could not have been allayed.
7. In a contrived attempt to lend credence to his account, Cheung claimed that a middle-aged woman shouted that Dor Dor bit people again (“隻狗又咬人啦”) after he fell onto the ground. He obviously wanted to make Dor Dor appear to have a previous record of violence. This allegation however was nowhere to be found in his witness statement. Sy did not make this allegation either. In cross-examination, Sy said that he did not hear such an utterance. Cheung insisted that he had told his legal advisors about this allegation already. If there had indeed been such a record, no doubt Cheung’s legal advisors could have discovered it and provided all the details upon making enquiries with the AFC Department. I cannot accept this new allegation.
8. Though I accept that Sy was present at the time of the Accident, his evidence was not reliable. To start with, he proffered no credible explanation as to why initially he was able to give graphic details of the Accident in his witness statement but just 2 days before the trial he found out that he knew so little about it and wanted to delete all the details.
9. I do not accept his allegation that Cheung had warned all the passengers inside his van against Dor Dor. Even Cheung himself did not say he had done so in his evidence.
10. YMH admitted that it was the occupier of Land A. Ms. Liu submitted that in the absence of a tenancy agreement between YMH and the Other Defendants, the Other Defendants being the registered owners retained control of Land A and thus were occupiers within the meaning of the OLO. I do not accept this submission.
11. Regardless of whether or not there was a tenancy agreement, it cannot be disputed that YMH occupied the Lands (except Land B) with the permission of the registered owners, either by way of a tenancy or a licence. I also accept that a landlord or a licensor can be an occupier within the meaning of the OLO so long as he has some degree of control over the state of the premises: Wheat v. Lacon [1966] A.C. 552.
12. Moreover, it is clear that Land A was occupied by YMH solely for its open storage purpose and it had control over Land A. While there can be multiple occupation of Land A, i.e., other occupiers of Land A, there is no evidence that the registered owners retained any control over Land A.
13. The undisputed evidence was that Wah was not involved in the business of YMH at all at the material time. Law was then the director and Lin was an employee of YMH. There is no evidence that they occupied Land A not just for the purpose of YMH but also for their own personal purpose.
14. A company’s actual occupation of premises must be vicarious, through its servants or agents: Wheat v. Lacon, *supra*, at p.571G per Viscount Dilhorne. While the servants or agents are physically on the premises, all control of the defective elements remain in the master and thereby relieves the servants or agents of liability, because in relation to that elements they are not occupiers: North, *Occupiers’ Liability* (1971) pp.27-28.
15. In the premises, I come to the conclusion that at the material time YMH, and not the Other Defendants, was the only occupier of Land A within the meaning of the OLO.
16. On the issue of liability, I make the following factual findings upon the acceptance of the undisputed evidence and my preference of the evidence of Yuen and Lin:
17. At the material time, YMH alone was the occupier of Land A;
18. Dor Dor was not a ferocious dog and it did not have any vicious propensity;
19. Cheung teased and provoked Dor Dor behind the Gate in the manner narrated by Lin when the other two visitors and Ho were loading goods onto the van. He continued to do so despite warnings;
20. Dor Dor was agitated and desperately broke free from the steel leash as a result of the provocation of Cheung. It escaped from the Gate by squeezing through the gap between the Gate and the ground and/or the bole of the bamboo palm;
21. After its entry to Land A, Dor Dor did not exhibit any aggressive behaviour. It did not pounce upon Cheung. It just walked slowly a few steps towards Cheung;
22. Cheung overreacted. He walked backwards and fell down carelessly. Dor Dor did nothing to lead to a forseeable consequence of Cheung’s fall. Cheung’s injuries were not caused by Dor Dor;
23. Since its arrival at Land B in March 2004, Dor Dor had had no previous record of violence and never appeared unleashed on Land A within the office hours of YMH prior to the Accident.
24. In coming to the conclusion that Cheung’s injuries were not caused by Dor Dor, I bear in mind the following obiter dictum of Wall, J. in Chauhan v. Paul, All England Official Transcripts (1997-2008), Court of Appeal (Civil Divison), 19.2.1998:

“In my judgment, whether or not the injury was “caused by” the animal is essentially an issue of fact. Thus, to take one of the examples canvassed in argument, if an innocuous dog barks at me as I am walking along the pavement and as a result I jump into the path of an approaching car, it may well be that any injuries I suffer were not caused by the dog, but by my excessive reaction to the dog’s bark. It would furthermore be difficult for the owner of that dog reasonably to foresee that when taking it for a walk its act of barking would have the consequences described.

However, if I am approached at speed by a large dog whose intentions may (unbeknown to me) be friendly; if as a consequence I take the reasonable decision to remove myself from the scene as soon as possible; and if in the process of running away I am chased by the dog and injure myself by falling over or having a heart attack, on these facts the damage I suffer is, in my judgment, caused by the dog.”

1. Given this factual finding alone, Cheung’s claim against the defendants, either in negligence and/or under the OLO cannot succeed. For the sake of completeness, I shall proceed to assess the validity of his claim in the light of other factual findings.
2. The scope and nature of the duties of a dog owner were thoroughly discussed by the Court of Appeal in Chiang Ki Chun Ian v. Li Yin Sze [2011] 5 HKLRD 727. Bharwaney, J., giving the judgment of the Court, reviewed some local, English and Canadian authorities concerning liability of an owner of a domestic animal. Not to overburden this judgment by citing extensively those authorities here, I shall only distill from them the following principles germane to the present case:
3. There is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour – the ordinary duty to take care in the cases put upon negligence;
4. For a non-ferocious animal, if it be proved that it 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 an obligation to do something by way of precaution;
5. Negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do something contrary to its ordinary nature and even if a defendant’s omission to control or secure his horse is negligent, an act on the part of the horse which is contrary to its ordinary nature cannot be regarded, in the absence of special circumstances, as being directly caused by such negligence.
6. Bharwaney, J. further stated the fundamental principle of the law of negligence: “a neighbour must refrain from an act or omission (in those case where he is charged with a positive duty to act) if he reasonably foresees a real, as opposed to a fanciful, risk of harm to his neighbour from his act or omission. The court must assess whether the risk of harm was real or whether it was fanciful and the court must do so by assessing the likelihood of the risk materialising on the specific facts and circumstances of the case before it, and by balancing the likelihood of the risk materialising against the severity of harm, were it to materialise, the cost and practicality of precautions, and the utility of the activity in question.” (§18 of the judgement)
7. In that case, it was found that there was a real, and not a fanciful, risk of an untoward reaction on the part of a tame dog to the continuous playfulness of a group of lively young children and thus it was incumbent on the dog owner or her agents to ensure the dog did not overreact to any of the children.
8. Cheung’s case against Yuen is put on the simple basis that she was negligent in failing to prevent Dor Dor from entering Land A during her absence. There is no allegation that Yuen put Dor Dor in such a use/position that it would likely to cause injury to others.
9. Given the guiding principles stated above, absent special circumstances, even if Yuen was negligent in failing to prevent Dor Dor from entering Land A and thereafter Dor Dor did something out of its character (which I do not find to be the case), Yuen should not be held liable for such untoward acts of Dor Dor.
10. In my judgment, Yuen was not negligent at all though Dor Dor managed to break free from its steel leash and escaped from Land B. The relevant consideration is reasonable foreseeability on the part of Yuen. It should be noted that for almost 3 years prior to the Accident, on a frequent basis, strangers appeared at Land A. Such strangers should be adults and they went to Land A for the specific purpose of handling building materials. Behind the Gate, Dor Dor was used to seeing such people come and go. Never once had Dor Dor escaped from the Gate and appeared alone at Land A within the office hours of YMH. Yuen could not have reasonably foreseen that among such visitors, there might be someone of a playful nature who would provoke Dor Dor to such a degree that Dor Dor would react so strongly as to break free from its steel leash and enter Land A. The risk of such an occurrence was indeed fanciful.
11. It is also noteworthy that Dor Dor was all along a tame dog to Yuen and it had never behaved aggressively or violently. But for the provocation of Cheung, Dor Dor would not have done what it did.
12. Dor Dor was leashed and tied to a metal pole behind the Gate. Yuen had done sufficiently to keep Dor Dor confined at Land B in the circumstances of the present case. Further, I find that Dor Dor did not act aggressively or violently on Land A.
13. For the same reasons, YMH and the Other Defendants cannot be held liable in negligence for failing to prevent Dor Dor from entering Land A. It was not incumbent on any one of them to give any warning to the visitors of Land A that Dor Dor might appear in Land A, either.
14. Ms. Liu relied on Draper v. Hodder [1972] 2 Q.B. 556 (C.A.). It does not assist Cheung’s case at all. The facts are easily distinguishable. There the court accepted the plaintiff’s expert evidence that a Jack Russell terrier had a propensity when moving in a pack to attack any moving person or thing and the court further found that the defendant who was an experienced dog breeder should reasonably foresee that substantial physical harm would result from an escape of his Jack Russell terrer puppies. In the present case, as confirmed by Ms. Liu in her closing submission, there is simply no evidence of Dor Dor’s vicious propensity and Yuen’s knowledge thereof. Yuen could not reasonably foresee that Dor Dor would cause bodily harm if it escaped from Land B.
15. Cheung relied on the same allegations for his claim made under the OLO. In addition, Ms. Liu submittted that Ho and Lin did not do anything to ensure the safety of Cheung when they saw Dor Dor appearing on Land A.
16. In the light of the factual findings I have made, there was no breach of any duty under section 3(2) of the OLO on the part of YMH. At the time of the Accident, the mere presence of Dor Dor and its few slow steps towards Cheung did not make Land A a dangerous place. Ho and Lin did not need to do anything to make it a safer place. Cheung remained to be reasonably safe in using the premises for his collection of the building materials purchased. Cheung’s claim made under the OLO should also fail.
17. Mr. Fung, counsel for YMH and the Other Defendants, raised an interesting point. He contended that Cheung was permitted to use Land A for business purpose only and when he without any licence, express or implied, misused Land A to tease Dor Dor, he became a trespasser and the OLO ceased to have application. In this connection, Mr. Fung cited R v. Jones & Smith [1976] 1 W.L.R. 672.
18. Ms. Liu’s answer in her written closing submission was that at the time of the Accident, Cheung remained in Land A with the permission of YMH and his presence was known to YMH and its employees and no objection was ever raised thereto. She submitted that the behaviour of a lawful visitor would not change his position to a trespasser.
19. In view of my factual findings and legal analysis made above, the question as to whether Cheung was converted to be a trespasser is academic. Since this point was argued, however, I propose to deal with it briefly.
20. I accept that if a lawful visitor makes an improper use of the premises, he may be converted into a trespasser; for “when you invite a person into your house to use the staircase, you do not invite him to slide down the banisters.”: per Scrutton L.J. in The Carlgarth [1927] 93 at p.110.
21. Cheung’s presence on Land A was permitted by YMH and it was for business purpose only. Cheung stayed there throughout for that purpose. I do not accept that his teasing and provocation of Dor Dor for a brief moment amounted to an improper use of Land A thereby rendering his licence to use Land A for business purpose revoked. Thus, I do not accept that at the time of the Accident, Cheung was a mere trespasser.

CONCLUSION (LIABILITY)

1. Cheung is unable to establish his claim against any of the defendants on the evidence. His claim falls to be dismissed with costs despite the dogged efforts of Ms. Liu.
2. Strictly speaking, the issue of contributory negligence does not arise. For what it may be worth, given my finding that the provocation of Dor Dor by Cheung was the main cause of its escape from Land B, I would have assessed Cheung’s contributory negligence at 60% if necessary.
3. If liability were to be established against all the defendants, no doubt Yuen, being the owner and keeper of Dor Dor, should bear the lion share of the blame. Where necessary, I find it just and equitable to apportion liability at 70% on the part of Yuen and 30% on the part of YMH and the Other Defendants.

**QUANTUM**

1. I shall proceed to assess the damages recoverable by Cheung on the basis that he is 60% contributorily negligent.
2. After the Accident, Cheung was first sent to Northern District Hospital and for geographical reason he was later transferred to United Christian Hospital (“UCH”) for emergency treatment.
3. The diagnosis was traumatic fracture of right hip (neck of femur) after X-ray of pelvis. It was a Garden type IV comminuted fracture. On 6 February 2007, a closed reduction and screw fixation was done as an emergency operation.
4. After the operation, displacement of fracture was however noted. Cheung underwent another operation to have a second close reduction and internal fixation on 9 February 2007. He was allowed touch-down walking exercise afterwards.
5. Cheung received follow-up treatments at the out-patient clinic of UCH and was allowed partial weight-bearing exercise since 19 March 2007.
6. An X-ray examination was taken on 24 October 2007 and it showed good fracture healing with no complication. He was suggested to resume work.
7. On 9 November 2009, Cheung complained about increased hip pain. An X-ray examination disclosed features of Avascular Necrosis (“AVN”) of right hip and no cut-out of screws was noted. Cheung was referred to the Arthroplasty clinic at UCH. A MRI examination was performed in July 2010 and it showed right femoral head AVN with articular collapse and early ostoarthropathy.
8. An operation for removal of screws and hip arthoscopy was performed on 3 December 2010. Cheung was discharged on 8 December 2010 walking with elbow crutches on partial weight-bearing.
9. Between 13 March 2007 and 25 October 2007, Cheung attended a total of 24 treatment sessions at the Physiotherapy Department of UCH. Cheung also received Chinese medical treatments with acupuncture at Kwong Wah Hospital for about 24 times.
10. Cheung also attended private orthopaedic consultation. He attended Dr. Yeung Kong Fan’s clinic once and Dr. Chan Sai Keung’s clinic once.
11. Cheung was granted sick leave from 5 February 2007 to 24 October 2007 and from 3 December 2010 to 1 March 2011. Altogether 334 days of sick leave were given.
12. There was a joint expert report by Dr. Chien Ping Eric and Dr. Poon Kai Ming dated 21 September 2010. They confirmed that Cheung suffered from the diagnosis of (1) Garden type IV, comminuted fracture of the right neck of femur and (2) complications of the fracture, namely, AVN, Ficat type III. They agreed that the diagnoses were consistent with the mechanism of the injury on 5 February 2007.
13. Cheung complained to the 2 doctors about his residual problems. He still suffers from right hip pain and soreness with limited walking pace. He had difficulty in lifting weight and going upstairs. Lastly he complained about left paraspinal lower lumbar discomfort.
14. Dr. Chien and Dr. Poon agree that the symptoms were consistent with the injury and were genuine. They further opine that these residual problems are solely caused by the Accident.

*Pain Suffering and Loss of Amenities (PSLA)*

1. Cheung was 44 years old at the time of the Accident. For the injuries sustained in the Accident, he was hospitalised for 17 days in February 2007 and for 6 days in December 2010. He has undergone 3 operations and attended many treatment sessions.
2. I agree with Mr. Yue that Cheung exaggerated slightly in his witness statement about the adverse effect his injury brought to him in his daily life.
3. Ms. Liu submitted that the award under this head should be HK$450,000 relying on Ho Ka Yin v. Express Security Ltd. [2011] 4 HKLRD 395, Tai Mei Lin v. Fung King Kong, *unreported*, HCPI 425/2006, 12.7.2007, Wan Man Kit v. Poon Chi Man, *unreported*, HCPI 393 of 1999, 16.6.2000 and Yu Shui Chun v. Club Chisen Limited, *unreported*, HCPI 134 of 1994, 22.12.1998.
4. After reviewing these cases, I find the case of Tai Mei Lin closer to the prsent case. I award Cheung HK$400,000 for PSLA.

*Pre-trial Loss of Earnings*

1. Prior to the Accident, Cheung claims that he earned about HK$8,000 per month. He was a self-employed driver and he charged at an hourly rate of HK$80. He also undertook delivery work involving lifting heavy objects and he charged HK$450 per task. He produced no documentary evidence to prove his income.
2. Ms. Liu helpfully drew my attention to Or Chun Kwong v. Fu Sau Lun, Jason and Ors., *unreported*, HCPI 384 of 2005, 8.12.2006 and Wong Ka Ming v. Ng Yin King and Anor., *unreported*, HCPI 760 of 2009, 2.6.2011. Despite the lack of documentary evidence, I take into account the fact that Cheung had to support the living of his wife and his 3 children who were at school and a monthly income of HK$8,000 does sound probable to me. Mr. Fung and Mr. Yue agree.
3. Given the undisputed 344 days’ sick leave, Cheung’s full loss of earnings over the sick leave period should be HK$89,066.67.
4. Cheung claimed that after the Accident he could only work as a self-employed van driver and deliver worker on a part-time basis making about HK$3,200 per month. He said he lived on loans extended by friends and relatives. Again he has produced no documentary evidence to support his allegation. Only in cross-examination did Cheung disclose for the first time that he received a monthly allowance of HK$6,000 from the Social Welfare Department.
5. Dr. Chien and Dr. Poon agreed that Cheung should be able to resume his pre-accident occupation as a driver in delivering goods with reduced capacity and endurance.
6. I am unable to accept Cheung’s assertion that he only earns HK$3,200 after the Accident. In the light of the medical evidence, I do not give any further compensation in addition to HK$89,066.67 under this head.

*Post-trial Loss of Earnings*

1. Whilst the parties agree that the appropriate multiplier should 8, the parties differ in the amount of multiplicand.

1. Cheung claimed that he might be able to earn about HK$5,000 per month and so the multiplicand should be HK$3,000. Mr. Fung and Mr. Yue do not agree.
2. Due to the ability of Cheung to return to his pre-accident job, I do not think he should be given any further compensation under this head.

*Loss of Earning Capacity*

1. For unknown reason, Cheung abandons his claim under this head.

*Future Medical Expenses & Rehabilitation Costs*

1. Cheung asks for HK$555,000 under this head being total costs for hip replacement, subsequent revision surgery and rehabilitation. The defendants dispute the necessity of such costs.
2. Both Dr. Chien and Dr. Poon opined that Cheung was likely to develop early degenerative conditions of his right hip. Manual labour work would accelerate degeneration. Symptoms of pain and stiffness would appear. Hip replacement can relieve such pain and stiffness and improve the function of his right hip with post-operative rehabilitation.
3. Dr. Chien and Dr. Poon estimated the cost for the replacement surgery to be HK$150,000 to HK$200,000 for semi-private patients for the first surgery; the cost for subsequent revision surgery ranging from HK$200,000 to HK$500,000 depending on the complexity of pathology in relation to loosening; wear and tear of the implant and bone deficiency. Lastly the cost for the rehabilitation after the first and revision surgery would range from HK$25,000 to HK$50,000.
4. Ms. Liu relied on Wong Ching Ha v. Manbright Co. Ltd. t/a Ngan Lung Restaurant, *unreported*, DCPI 886 of 2007, 31.3.2008 and Kot Yik Kam v. Kwok Kam Hung and Anor., *unreported*, HCPI 292 of 2004, 1.2.2005. She argued that Cheung is entitled to have his operations performed by private practitioners and have the costs recovered from the defendants.
5. Mr. Yue meticulously drew my attention to several aspects in the evidence and argued that the treatments proposed were not necessary and even Cheung had indicated that he was not keen on a replacement surgery.
6. I am persuaded by the medical evidence that Cheung would need such operations and treatments and he is entitled to have them performed by private practitioners. I would however only allow HK$200,000 for the initial hip replacement operation and HK$35,000 for rehabilitation costs. I do not allow cost for revision operation, the necessity and probability of which I am not convinced on the evidence.
7. Hence, an award of HK$235,000 under this head would have been adequate.

*Special Damages*

1. Cheung claims HK$10,000 under this head consisting of HK$3,925 being medical expense and HK$1,700 being travelling expense. Mr. Yue only agreed HK$6,720 to be appropriate. Mr. Yue validly criticised Cheung’s evidence relating to this claim and highlighted the lack of documentary evidence to prove the balance.
2. That said, I would accept that the balance being a little bit over HK$3,000 has actually been incurred and recoverable. I would have allowed the whole amount of HK$10,000 under this head.
3. Had liability been established agaist the defendants, interests on general damages should have accrued from the date of the writ at the rate of 2% per annum. Interests on special damages should have accrued from the date of the Accident at half of the judgment rate to the date of judgment and thereafter at the judgment rate.

CONCLUSION (QUANTUM)

1. The quantum can be summarised as follows:

i. PSLA HK$400,000

ii. Pre-trial loss of earning HK $89,066.67

iii. Future medical and

rehabilitation expenses HK$ 235,000

iv. Special damages HK$ 10,000

Total: HK$734,066.67

1. The defendants would only have been liable for 40% of the sum of HK$734,066.67, i.e. **HK$293,626.70** and according to my apportionment, Yuen would have been liable for the amount of **HK$205,538.70** being 70% of the sum of HK$293,626.70 and YMH and the Other Defendants for the amount of **HK$88,088** being the balance.

OUTCOME

1. For the reasons given, the action is dismissed. I shall make a costs order *nisi* that Cheung do pay to the defendants their costs of the action, with certificate for counsel, to be taxed if not agreed.

1. I thank Ms. Liu, Mr. Fung and Mr. Yue for their commendable efforts and I have been substantially assisted especially by their detailed written submissions.

# (Kent Yee)

# Deputy District Judge

Ms. Alice Liu, instructed by Messrs. B. Mak & Co., for the Plaintiff

Mr. Keith Fung, instructed by Messrs. Rene Hout & Co., for the 1st, 3rd, 4th and 5th Defendants

Mr. Jonathan Yue, instructed by Messrs. Kevin Li & Co., for the 2nd Defendant