DCPI 1495/2017

[2021] HKDC 225

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1495 OF 2017

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BETWEEN

CHAN CHI YING Plaintiff

and

SCHINDLER LIFTS (HONG KONG) LIMITED Defendant

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Before: Master Matthew Leung in Chambers (Paper Disposal)

Date of the Defendant’s Submissions: 22 October 2020

Date of the Plaintiff’s Submissions: 14 January 2021

Date of the Defendant’s Submissions in Reply: 29 January 2021

Date of Decision: 5 March 2021

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| DECISION |

1. This is the Defendant’s application by Summons dated 6 October 2020 (“**the Summons**”) for leave to expunge certain paragraphs in the Joint Expert Report on liability. Paragraph 1 of the Summons reads as follows: “paragraphs 3, 6, 7, 8.3 (from “the Inspection … to meet the requirements.”), 8.8 (last sentence), 9.1 to 9.5, 10.2 to 10.4, 10.5 (except last sentence), 10.6, 11.1 to 11.3, 12.1 to 12.2 and 13.1 of the Joint Expert Report prepared by Dr Ho Pui Lam Benjamin and Mr Ho Shi Fun Ivan dated 10 January 2020 be expunged or struck out on the grounds that they are unnecessary, irrelevant and/or of no probative value, and are inadmissible.”
2. The parties agreed that the Summons shall be determined by paper disposal.

**Background of the case**

1. The Plaintiff was employed as a waitress in a Chinese restaurant situated at the 1st Floor of a building. On 30 November 2014, the Plaintiff was asked to proceed to the storage room at the 2nd Floor of the building and collect some stock there. After collecting the stock, the Plaintiff boarded the Lift at the 2nd Floor with a trolley intending to return to the 1st Floor. However, the Plaintiff was trapped in the Lift for about 10 minutes despite the Plaintiff repeatedly pressing the open and close buttons. The door of the Lift then suddenly opened when the Lift was still on the 2nd Floor. The Plaintiff tried to push the trolley out but the door suddenly started to close again, thereby hitting the Plaintiff’s shoulder. The Plaintiff was trapped between the door and the wall of the Lift (“**the Accident**”).
2. The Plaintiff claims against the Defendant, being the contractor responsible for the maintenance of the Lift, for the loss and damage suffered as a result of the Accident.
3. It was pleaded in paragraph 7 of the Defence filed on 21 September 2017 that the Defendant has taken all reasonable measures to ensure the safety of the lift users, and despite inspections and maintenance, the fault of the KTC contact cannot be reasonably detected prior to the Accident.
4. By an Order made by Master Catherine Cheng dated 5 July 2019, leave was granted to the parties to adduce expert evidence on liability from one mechanical and electrical engineering expert for each party, namely Dr Benjamin Ho for the Plaintiff and Mr Ivan Ho for the Defendant. The Joint Expert Report was filed on 23 January 2020 (“**the Report**”).
5. The Joint Expert Report showed that the parties have asked the experts to address the following questions in relation to the present proceedings:
6. What is KTC and what functions does it serve?
7. The cause of the KTC malfunctioning,
8. Whether there was anything which is likely to be in question with the Lift so that its door did not remain open when the Plaintiff had not finished passing through?
9. Whether the KTC fault could be detected upon proper inspection and maintenance?
10. Whether the poor contact of the lift doors could be caused by erosion which could be observed by the naked eye?
11. Whether the KTC malfunctioning and/or poor contact of the lift doors could be caused by sudden obstruction by foreign objects (e.g. rubbish fallen into/in the vicinity of Lift doors)?
12. Was the KTC an item of equipment that ought to be regularly inspected and replaced if found wanting, etc. Whether the scope of regular maintenance conducted by the Defendant’s technician covers KTC component?
13. Whether there was / were any malfunctioning component(s) or parts of the Lift which could cause the door to be closed when the Plaintiff had not finished passing through?
14. Whether the frequency of the regular maintenance of the Lift conducted by the Defendant’s technicians was reasonable and adequate?
15. The Report showed that both Dr Ho and Mr Ho inspected the Lift on three occasions. They also considered the relevant information listed in paragraph 5 of the Report. In particular, paragraph 5.6 of the Report stated that the management office called for lift repair service at 8:20 a.m. on the date of the Accident and the technician considered that a door safety device (KTC) was out of order. He repaired the KTC and the Lift resumed service at 11:00 a.m.
16. The questions raised by the parties in the Joint Instructions Letter were answered by the experts in paragraph 8 of the Report.
17. The grounds for expunging those paragraphs in question as submitted by the Defendant can be summarised as follows:
18. The experts inspected the Lift about 5 years after the Accident while the condition of the Lift did not remain unchanged for the past 5 years. The findings from the inspections were not helpful for the determination of the dispute in the present proceedings (para 3, 6, 7, 8.3 (from “The inspection … to meet the requirement), 8.8 (last sentence), 9.1, 9.3 (first sentence), 10.1 and 10.6).
19. The experts provided some opinion evidence which were outside their expertise or the experts even attempted to deal with facts which should be the matters for the judge at the trial (para. 9.2, 9.4, 9.5, 10.2-10.6, 12.1-12.2, and 13.1).
20. The experts provided in the Report a section entitled “Further Recommendations” which were irrelevant to any issue in dispute (para. 11.1 to 11.3).

**The legal principles**

1. Order 38 rule 4 of the Rules of the District Court provides that “the Court may, at or before the trial of any action, order that the number of …… expert witnesses who may be called at the trial shall be limited as specified by the order”.
2. Order 38 rule 6 states that except with the court’s leave or the consent of all parties, no expert evidence may be adduced at the trial or hearing unless the party seeking to adduce the evidence has first sought and complied with directions of the court concerning pre-trial disclosure of the substance of the expert evidence sought to be relied on.
3. Order 38 rule 44 provides that any direction given under that Part of the Order may on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.
4. Expert evidence must be relevant, necessary and of probative value. In ***Wong Hoi Fung v American International Assurance Co (Bermuda) Limited & anor***, HCA4576/2001 (unreported, 8 October 2002) Chu J (as she then was) said that:

“11. Modern judicial authorities recognize that the court has inherent power to rule on the admissibility of expert evidence at a pre-trial stage : *Woodford and Ackroyd v. Burgess* [2000] CP report 79, *Ko Chi Keung v. Lee Ping Yan Andrew* [2001] 2 HKC 63 and *Annabell Kin Yee Lee & Others v. Lee Wing Kim (May Lee) & Anor (unreported)*, HCA9522/1997. Where the proposed expert evidence is plainly inadmissible or irrelevant, the court ought to exercise its discretion to refuse the admission of such evidence. But where the court cannot form a clear view on the relevance of the proposed expert evidence or where it considers that the proposed evidence is clearly relevant, then it should grant leave for the evidence to be adduced at the trial : *Ko Chi Keung v. Lee Ping Yan Andrew (supra)*, at p.67 and *Annabell Kin Yee Lee & Others v. Lee Wing Kim (May Lee) & Anor (supra)*, at p.15.

12. …… the evidence must be relevant, in the sense that it is helpful to the court in arriving at its decision on one or more of the issues to be resolved : *Barings plc (in Liquidation) & Anor v. Coopers and Lybrand & Ors, Lexis Transcript*, 9 February 2001, Evans-Lombe J at paras.44-45.”

1. In ***Li Siu Ping and another v. Perfecta Dyeing, Printing & Weaving Works Ltd***, DPCI 901/2006 (18 July 2007, unreported), HHJ Ng (as she then was) said that:

“59. Almost invariably, where expert evidence on liability is adduced, the relevant expert was not present at the time of the incident. But if the subject matter deserves expert opinion under the principles discussed above, the expert opinion is necessarily based on (a) facts observed by the expert and (b) assumed or accepted facts. In respect of (a), the expert’s factual observations must be stated and proved by him. In respect of (b), the assumed or accepted facts must be proved by the party adducing the expert opinion by some other way. Where expert evidence on liability is required, admissibility does not turn on whether the expert can give factual evidence as to what happened at the time of the incident. Rather, the expert should give a proper basis for his opinion by explaining how his special knowledge and expertise in an area of which he is an expert by experience or training applies to the facts in (a) and (b) above.”

1. The Defendant submitted that the Court should be empowered to review an earlier case management direction relating to expert evidence under Order 38 rule 44 of the Rules of the District Court. I consider that, rather than treating the present exercise as a review of an earlier case management order on expert evidence, the application should be premised on the court’s power / discretion to expunge certain part of the expert report on the ground that they are irrelevant, unnecessary, and not of probative value: see paragraph 76 of the Judgment of the case of ***Li Siu Ping***.

**Paragraph 3 of the Report**

1. Paragraph 3 of the Report set out the dates of the inspections by the experts. The Plaintiff submitted that in fact the experts were invited to inspect the Lift by the joint letter of instructions prepared by the Solicitors for the Plaintiff and the Solicitors for the Defendant. The Plaintiff argued that it cannot be understood why the Defendant wished to expunge the paragraph.
2. There is no dispute that the experts were engaged to comment on the function of KTC of the Lift. As a matter of facts, before compiling the Expert Report, the experts did inspect of the Lift. They have acknowledged in paragraph 10.1 of the Report that the inspection was conducted 5 years after the Accident and their observations could only reflect the condition of the Lift *at the time of the inspection*. The experts were not in a position to say whether there had been any changes of the Lift over the past 5 years. In any case, whether there was any change over the Lift was a factual issue. However, there is nothing wrong to make a record in the Report that the experts did inspect the Lift in question before writing the Report. I see no basis for expunging paragraph 3.

**Paragraphs 6 and 7 of the Report**

1. Paragraphs 6 and 7 of the Report dealt with the inspections, the measurements and observations of the experts. In essence, that was a record of the observations and measurements made by the experts during the inspections. Again, the inspections took place 5 years after the Accident and the experts were not in a position to tell whether changes had been made over the Lift for the past 5 years before the inspection. The conditions of the Lift *at the time of the inspection* had no relevance to any issues in the present proceeding.
2. The Plaintiff submitted that there was no information from the Defendant’s technician that the inspection, measurements and observations were not properly done or that the lift *had been substantially changed* since the Accident in late 2014, and that to expunge those paragraphs would deprive the Court of the factual matrix revolving the functioning or malfunctioning of the Lift. I do not accept the Plaintiff’s submissions. One could not assume that the conditions of the Lift *had not been substantially changed* for the past 5 years before the inspection took place. Any information or evidence about the measurements or other observations of the Lift at the time of the Accident could be properly adduced by documentary evidence or factual witnesses. It would not be the experts’ functions to carry out measurements and observations of the Lift, which were factual evidence only. Accordingly, paragraphs 6 and 7 should be expunged.

**Paragraphs 8.3, 8.8 and paragraph 9 of the Report**

1. The relevant passages of Paragraph 8.3 of the Report read as follows:

“The inspection did test the situation for (b) by placing a pile of paper to obstruct the lift landing door from closing. In a test with the thickness of the paper around 20 mm, the lift door re-opened. In another test with the thickness of the paper around 10 mm, the lift door continued to close. It seems that for the Lift under inspection, the effect of the door re-opening safety device was neutralized during the last 20 mm of travel of the door panel, which satisfied the requirement. The situation for (c) was also tested by intentionally stopping the lift door from closing (as explained in 7.7). It was observed that an audible alarm sounded but the lift door closing speed was not reduced to meet the requirements.

1. The relevant sentence of Paragraph 8.8 of the Report read as follows:

“In this case, tests conducted in the inspection have shown that the lift system was having the neutralization set to be at the last 20 mm of travel of the door panel, which is already a very narrow gap but enough to pinch a hand or finger.”

1. Paragraphs 9.1 to 9.5 of the Report, broadly speaking, dealt with the findings of the experts after performing the tests on the Lift during the inspections.
2. The Plaintiff argued that those paragraphs should be retained because there was sufficient factual material for the experts to consider, including the inspection of the Lift, as to how the Lift functioned and what might have gone wrong. The Plaintiff also submitted that there was a proper basis for the experts’ opinion as that was based not only on their inspection of the Lift, but also on the maintenance records and the witness statement of the Plaintiff and the Defendant.
3. In my judgment, the quoted sections of paragraph 8.3 and 8.8 were concerning the tests carried out during the inspection which took place 5 years after the Accident. The condition of the Lift *at the time of the inspection* is irrelevant to the present proceedings. Those sections should be expunged.
4. On a closer look at paragraph 9, I note that paragraph 9.1 set out the experts’ observations during the inspection, namely that the Lift was operating normally *at the time of the inspection* and no major faulty installation or control of the Lift was discovered. That, again, related to the condition of the Lift *at the time of the inspection* and was irrelevant to the present proceeding.
5. In paragraph 9.2, the experts opined that the most likely case was that the Plaintiff was hit on the shoulder by the Landing Door when she was in the course of crossing the entrance. They formed the view after considering the report in the Logbook in which the technician did not find any problem with the safety shoe. I am of the view that the paragraph could be retained and it would be up to the trial judge to accept their opinion or not.
6. In Paragraph 9.3, the experts commented that nothing could prevent the Plaintiff’s hand or finger from being pinched if placed accidentally at the door frame and she might still get hurt. The opinion was made on the basis that the door sensitive protective device was having neutralization set at the last 20 mm of travel. Whether factually it was the case at the time of the Accident was a separate issue. But the experts should be able to give such an opinion based on certain assumed facts, and it would be up to the trial judge to accept the opinion evidence or not.
7. The experts in paragraph 9.4 considered the maintenance service record and analysed the number and the nature of the breakdown of the Lift. I consider that the opinion was made within their expertise and there is no basis for expunging the paragraph 9.4.
8. Paragraph 9.5 suggested that the Plaintiff might have registered a car call to go to 1/F before she tried to leave the Lift or a landing call so happened to be registered in other landings, and under that situation the lift door after fully opened would start closing almost immediately, disallowing sufficient time for her to leave the car. That paragraph should be retained.
9. Hence, for paragraph 9, only para 9.1 should be expunged.

**Paragraphs 10.2 – 10.4, 10.5 (expect the last sentence) and 10.6 of the Report**

1. The Plaintiff argued that those paragraphs served to advance the various possible factual scenarios and it would be for the trial judge to rule which scenario should be more likely.
2. In paragraph 10.2, the experts commented that the evidence of the Plaintiff was incorrect regarding the door opening and closing direction. The experts said that when one stood inside the Lift and facing the door, the door should open from the left to the right. In my view, the opening and closing directions of the lift door should be a factual issue, and no expert evidence is required. In fact, that issue had been dealt with by the witness statement of the Defendant. Paragraph 10.2 should be expunged.
3. Paragraph 10.3 and 10.6 dealt with the door timing and the door closing force of the Lift. The experts made comments thereon on the basis of the inspections and the various tests they had made. In particular, the experts said in paragraph 10.3 that “the door timing when the Lift door would open again if being obstructed (with the KTC not operative) was found to be less than 1 minute. This was believed to be the actual time of trapping of the Plaintiff, not 10 minutes as mentioned by the Plaintiff in her Statement.” In my judgment, there is insufficient factual basis for the experts to draw such a conclusion. In any event, it would not be for the experts to make such a finding. Since the inspection was conducted 5 years after the Accident, the condition of the Lift at the time when the experts carried out the inspection was irrelevant to the present proceedings. Those paragraphs should be expunged.
4. In Paragraph 10.4, the experts suggested that the sudden closure of the lift door might be due to the control function of the Lift after the lift door was obstructed. I agree that the experts could advance possible factual scenarios for the trial judge to consider. This paragraph should be retained.
5. In Paragraph 10.5 (except the last sentence), the experts commented that the lift technician was asked to find out the defect of the Lift, and he was not informed about the injury and so he focused on the trouble-shooting on why the Lift was not operative. In my view, it is beyond the role of the experts to comment on the evidence of the lift technician. The paragraph (except the last sentence) should be expunged.

**Paragraph 11 of the Report**

1. The Plaintiff agreed that paragraphs 11.1 and 11.2 did not address any issue in contention between the parties and ought to be expunged. I agree.
2. The Plaintiff argued that paragraph 11.3 was made in answer to question 10 of the Joint Instructions Letter where the experts were asked to comment on “any further information which you find relevant.” In my view, whether the answer was made in response to the instructions is neither here nor there. The real issue is whether the expert evidence is relevant, necessary and of probative value. In paragraph 11.3, the experts made recommendation that the control function of the Lift after the re-open operation due to lift door obstruction and reset should allow ample time before the door is closed, even if a new call is received. I fully understand Dr Ho’s suggestion (as mentioned in paragraph 12.1 of the Report) that the cause of the Accident was not due to the trapping but to the Plaintiff not having sufficient time to leave the Lift and was hit by the lift door. But when the expert went further to recommend that sufficient time should be allowed before the lift door is closed again, that comment is a separate issue. As mentioned before, the door timing was measured by the experts *at the time of the inspection*, not at the time of the Accident. On that basis, I am of the view that paragraph 11.3 is irrelevant, and does not assist the Court to resolve any issue or dispute between the parties.
3. Based on the foregoing, the whole paragraph 11 (including 11.1, 11.2, and 11.3) should be expunged.

**Paragraphs 12 and 13 of the Report**

1. The Plaintiff argued that paragraph 12.1 set out one of the conclusions of Dr Ho based on the information that he had in hand and it was drawn from his experience and expertise as a mechanical engineer.
2. In that paragraph, Dr Ho suggested that the cause of the Accident was not due to the trapping but to the Plaintiff not having sufficient time to leave the Lift and was hit by the lift door. I am of the view that there is nothing to suggest that this paragraph is irrelevant. Paragraph 12.1 should not be excluded.
3. The Plaintiff conceded that paragraphs 12.2 and 13 should be expunged as it is not the experts’ remit to advise on whether there was any contributory negligence on the Plaintiff’s part. I consider that the issue of the Plaintiff’s own negligence, if any, should be a matter for the trial judge. Paragraph 12.2 and 13 should be expunged.

***Costs***

1. The Report was made on the joint instructions made by the Solicitors for the Plaintiff and the Solicitors for the Defendant. The matters arising from the Report is a case management matter. I make an order *nisi* that the costs of the Summons be costs in the cause.

**Conclusion**

1. Based on the foregoing, I hereby make the following order:
2. Notwithstanding paragraph 5 of the Order made by Master Catherine Cheng dated 15 January 2020, extension of time be granted to the Defendant to take out the Summons filed on 6 October 2020 (“**the Summons**”).
3. Paragraphs 6, 7, 8.3 (from “the Inspection … to meet the requirements.”), 8.8 (last sentence), 9.1, 10.2 to 10.3, 10.5 (except the last sentence), 10.6, 11.1 to 11.3, 12.2 and 13 of the Joint Expert Report prepared by Dr Ho Pui Lam Benjamin and Mr Ho Shi Fun Ivan dated 10 January 2020 be expunged on the grounds that they are unnecessary, irrelevant and/or of no probative value, and are inadmissible.
4. There be costs order *nisi* that the costs of the Summons be costs in the cause.
5. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Matthew Leung)

Master, District Court

Ms Christina Lee, instructed by Messrs. Or & Partners, for the Plaintiff

Messrs. Deacons, Solicitors for the Defendant