DCPI 534/2017

[2023] HKDC 347

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 534 OF 2017

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##### BETWEEN

AMJAD-UL-MAHMOOD Plaintiff

and

PROFIT HILL INTERNATIONAL 1st Defendant

HOLDINGS LIMITED

THE INCORPORATED OWNERS 2nd Defendant

OF DAILY HOUSE

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Before: Deputy District Judge Rebecca Lee in Court

Date of Hearing: 26 - 29 September 2022 & 20 December 2022

Date of Judgment: 21 March 2023

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JUDGMENT

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1. At all material times, the plaintiff (“P”) was employed by the 1st defendant (“D1”) as a delivery worker. His job duties were to deliver goods from the D1’s warehouse in Hankow Road Tsim Sha Tsui to D1’s various shops, one of which was situated at 3/F Daily House, 35-37 Haiphong Road, Tsim Sha Tsui (“Daily House”).
2. The 2nd defendant (“D2”) was and is the incorporated owners of Daily House.
3. P’s case, in a nutshell, is that on 10 March 2014, while in the course of employment with D1, he took lift number L2 (“the Lift”) on 3/F of Daily House with a view to travel to 1/F, the Lift fell rapidly from 3/F to 1/F and shot back between 1/F and 2/F. P was trapped until released by the Fire Services. P suffered neck and back injury as a result (“the Accident”).
4. P sued D1 for employees’ compensation under DCEC 171/2016. The proceedings was settled as D1 paid a sum of HK$338,000 (inclusive of costs) to P.
5. P was previously represented by Messrs Massie & Clements (“MMC”) in the present proceedings. MCC has filed with the court, among other things, Amended Statement of Claim dated 11 September 2018 (“ASOC”), Statement of Damages dated 15 February 2018 and P’s witness statement dated 12 December 2018.
6. Under the ASOC, it is pleaded that:

“(8) The lift was a lift as defined by s.2 of the Lifts and Escalators Ordinance, Cap. 618, Laws of Hong Kong and the 1st and or 2nd Defendants were the responsible person in relation to the said lift as defined by s.2.

(9) The 1st Defendant and/or the 2nd Defendant were the occupiers of the said Daily House.

…

(11) The 1st and/or the 2nd Defendant were aware or ought to have known that the said lift was a danger to those using it including the Plaintiff.”

1. It is said that P’s injuries and damages were caused by the breach of statutory duty under the Lifts and Escalators Ordinance, Cap 618 (“LEO”) and Occupiers Liability Ordinance, Cap 314 (“OLO”) on the part of D1 and/or D2, as well as negligence on the part of D1 and/or D2.
2. P did not plead his case against D1 and D2 separately in the ASOC, except for particulars of negligence:

“a. The 1st Defendant as employer owed to the Plaintiff a duty of care to the Plaintiff to provide safe access and egress to his place of work.

b. The 2nd Defendant as the incorporated owners owed a duty of care to the Plaintiff to take reasonable care to see the Plaintiff would be reasonably safe in using the premises.

c. The 1st and/or 2nd Defendant caused or permitted the said lift to be or become or to remain a danger and a trap to the persons lawfully using the same including the Plaintiff.

d. … both the 1st and/or 2nd Defendant were aware that the said lift frequently malfunctioned causing a danger to its users.”

1. Under paragraph 5 of its Amended Defence, D1 admits that P met with an accident at work and suffered injuries but makes no admission to P’s allegations on how the Accident had occurred and whether his injuries were caused by the Accident.
2. D1’s Defence is straight forward, that being a tenant of Daily House, D1 has no power to possess, maintain and control of the Lift. D1 is thus neither an occupier nor the “responsible person” under LEO. D1 also denied that it was negligent, that there was no foreseeable risk of personal injury to P associated with his work.
3. By Contribution Notice dated 10 June 2020 and the Statement of Claim in the Contribution and Indemnity Proceedings dated 10 December 2020, D1 seeks contribution and/or indemnity against the D2 for (1) any damages payable in the present action; and (2) the EC Amount paid by D1, relying on section 25(1)(b) of the Employees’ Compensation Ordinance (Cap 282) (“ECO”) or alternatively s3 of Civil Liability (Contribution) Ordinance (Cap 377) (“CLCO”).
4. D1 avers in the Contribution and Indemnity Proceedings that the Accident was wholly caused or alternatively contributed by the negligence and/or breach of statutory and/or common duty of care on the part for D2:

“Particulars of Breach of Statutory Duties of the 2nd Defendant as the “Responsible Person” of the Lift concerned under Cap. 618:

1. Failing to ensure that the lift and all its associated equipment or machinery are kept in a proper state of repair and in safe working order, contrary to section 12(1) of Cap. 618.

Particulars of Negligence of the 2nd Defendant:

1. Failing to carry out corrective measures to the Lift as recommended by AEEL.
2. Causing or permitting garbage to remain in the landing door sill of the Lift.
3. Failing to maintain any or any reasonable supervision on its agent and/or employees that they had duly carried out their duties to keep the common areas of the building and the Lift reasonably clean and in good repair and condition.
4. Causing or permitting the lift concerned to be or become or to remain a danger and a trap to the persons lawfully using the same including the Plaintiff.
5. Exposing the Plaintiff to risk of damage or injury of which the 2nd Defendant knew or ought to have known.”
6. D2 did not blame D1 for P’s Accident and basically puts P to strict proof of his case. D2 denies that the Lift fell rapidly.
7. It is D2’s case that D2 had delegated the role of management of Daily House to Homechant Limited (“Homechant”), who is obliged to keep the common areas of Daily House reasonably clean and in good condition.
8. D2 had also contracted the maintenance and repair work of the lifts in Daily House to AEEL, a registered lift and escalator contractor. The supervisory role on AEEL was delegated to Homechant.
9. Under paragraph 5 of its Amended Defence, D2 pleaded that:

“(d) Even if (which is not admitted) there were several breakdown of the lifts and/or incidents of trapping in the lifts of the Building, the 2nd Defendant had no knowledge of the same as no incident reports were prepared and/or kept by Homechant.

(e) … Homechant had an effective and sufficient control of the lifts of the Building.

…

(g) … even if (which is not admitted) the alleged breakdown of the lifts and/or incidents of trapping in the lifts of the Building did take place in the past, it is averred that none of the alleged incidents involved any person being injured, feeling unwell and/or claiming for damages, as shown in the “Log Book for Lifts or Escalators” kept by AEEL.

(h) … the 2nd Defendant was… unaware of the alleged accident until a letter from Messrs. Massie & Clement, the solicitors for the Plaintiff dated 27 June 2017 was received by the 2nd Defendant.”

1. In paragraph 7, it is said that:

“(c) Even if there was an accident of the Plaintiff trapped in the Lift on or about 10 March 2014, it is denied that the Lift rapidly fell from 3/F to G/F of the Building and/or shot up between G/F and 1/F of the Building as alleged by the Plaintiff based on the reason that *nothing is suggested in the “Full Investigation Report for Lift/Escalator Incident” dated 17 March 2014 submitted by AEEL to EMSD that the Lift was involved in any kind of rapid fall and/or ascent after the Plaintiff entered into the Lift and the Lift door shut*…

…

(g) AEEL has all along conducted bi-weekly maintenance inspection of the lifts of the Building…

…

(i) … *Homechant… failed to supervise the maintenance works of the said lifts by the AEEL, review the condition of the lifts under their management and to take reasonable steps to ensure the lifts of the Building functioned properly including to solve any problem of the said lifts with the assistance from AEEL*.

(j) *It was the finding of AEEL that there was garbage found on the 1/F landing door sill which affected the smoothness of the lift door operation and caused the mechanical inter-linkage between the lift car door and landing door to be jammed; resulted in the lift door remained shut*. Nothing was mentioned by AEEL as to the alleged rapid fall and/or ascent of the Lift put forth by the Plaintiff.

…

(l) … there was also nothing suggested by the Fire Services Department in its Incident Report on the alleged rapid fall and/or ascent of the Lift, instead it merely mentioned the trapping of a male adult in the lift at the material times.”

1. D2 claimed that it was only one of the occupiers, and that it had delegated the role of management of Daily House to Homechant and the Lift to AEEL respectively.
2. It is averred that D2 had taken all reasonable steps to ensure that the lifts of Daily House are kept in a proper state of repair and in safe working order by engaging a competent contractor, AEEL: para 10(a)(iii).
3. It should be noted that D2, both in its Amended Defence and its Defence in the Contribution Proceedings, pleaded that an emergency braking system had been installed in the Lift at the material time. However, no evidence has been adduced by D2 in this regard.
4. Lastly, D2 pleads contributory negligence on the part of P, for, *inter alia*, failing to keep proper balance.

*Liability*

*P’s various heads of claims*

1. As said, the basis of P’s case against D1 and D2 is the same, ie breach of statutory duty under LEO and OLO, breach of occupier’s liability, as well as negligence.
2. Section 2 of LEO reads as follows:

“responsible person (負責人) means—

(a) in relation to a lift—

(i) a person who owns the lift; or

(ii) any other person who has the management or control of the lift;”

1. D2, as IO of Daily House, no doubt falls with the definition of “responsible person” under s2 of LEO.
2. D2 admitted to be one of the occupiers under its Amended Defence.
3. Even though D2 has entrusted the management of the Daily House (and the Lift) to Homechant (and AEEL), it does not mean that D2 ceased to be an occupier.
4. Evidence shows that AEEL maintained a logbook regarding the lifts installed at Daily House and it is D2’s own case that there were regular meetings between D2 and Homechant.
5. I am satisfied that D2 at all material times maintained sufficient control over the common area, including the Lift, to qualify as an occupier.
6. As a tenant of Daily House, D1 had no control of the Lift nor had anything to do with the maintenance and repair of the Lift.
7. I find that D1 is neither an occupier nor a “responsible person” under LEO.
8. As pointed out by Mr Gidwani for D1, the only viable cause of action open to P against D1 is common law negligence, ie whether D1 had provided a safe means of access and egress to his place of work.
9. In ASOC, P did not specify how D1 caused the means of access and egress of P unsafe. P did not plead what act or omission of D1 that “caused or permitted the Lift to be or become or to remain a danger and a trap” to a lawful visitor like P, except that “D1 was aware that the Lift frequently malfunctioned causing a danger to its users”.
10. Under ASOC and P’s evidence, during the time he worked for D1, he never had any accident when travelling the lifts of Daily House. He confirmed that he had never complained to D1 about malfunctioning of the Lift as there was nothing for him to report or complain about.
11. According to P, prior to his employment with D1, the lifts frequently malfunctioned when he worked for cosmetics chain SaSa as a retail store security guard. There is no evidence to show that D1 was aware of the malfunctioning of the Lift while P was working for SaSa.
12. There is no evidence to show that D1 knew or ought to have known the risk regarding P’s use of the Lift while P was in D1’s employment. The risk of P’s injury could not have been foreseeable to D1.
13. In the premises, I find that D1 could not have been liable to P for the Accident. P’s claim against D1 must fail.

*How the Accident occurred*

*Evidence of the Witnesses*

1. There are four witnesses at Trial: P himself, Chau Chung Yin, manager of D1 (“Chau”); Charles Chan, Chairman of D2 (“Charles”); and Pauline Chan, Vice-Chairlady of D2 (“Pauline”).
2. Chau’s evidence is largely uncontroversial. He has adopted the witness statements of Lam Chi Keung, D1’s original witness.
3. In addition, it is Chau’s evidence that after P was rescued by the firemen, P told him that P was trapped in the Lift. P also said that the Lift suddenly fell and there was pain in his waist. Chau accompanied P to the hospital.
4. Charles was not chairman of the IO at the time of the Accident. He did not speak with his predecessor nor did he have personal knowledge of the state of affairs as at March 2014.
5. His evidence mainly came from what he could deduce from the documents available to him after he became chairman. He only knew of P’s Accident after D2 was served MMC’s letter in June 2017.
6. Pauline was the Vice Chairlady of D2 since 2012.
7. Pauline’s evidence focused on the selection process of Homechant (by way of tender), delegation of responsibility to Homechant as well as D2’s supervision and monitoring of Homechant, via logbook prepared by AEEL and/or report from security guards.
8. She maintained that Homechant has put in the logbook about P’s trapping in the Lift. She was not personally informed by any security guard of P’s Accident at the time. She only knew about it when MMC sent the letter to D2 in June 2017.
9. P is the only person who could give evidence as to how the Accident occurred.

*P’s Evidence*

1. P confirmed his witness statement as his evidence in chief, except the parts under “Medical and Other Expenses”. P said he did not incur those expenses and had no idea why those paragraphs were inserted, despite that the witness statement was interpreted to him by a Mr Singh of MMC in Punjabi.
2. Accordingly, P did not claim any Special Damages under the (Revised) Statement of Damages he filed on 15 July 2020.
3. P confirmed in his witness statement that he could speak Punjabi, Urdu, Cantonese and some English. P’s choice of language in court was Urdu. P indicated that he was conversant in both Punjabi and Urdu though neither was his native tongue. During the course of trial, it is clear that P can manage conversational Cantonese. At times, he was able to cross examine Charles and Pauline in Cantonese, bypassing both the Urdu interpreter and the Cantonese interpreter.
4. Both Mr Gidwani and Mr Tsui cross-examined P extensively as to how the Accident occurred.
5. P’s description of the Accident can be summarized as follows:
   1. The Lift fell from 3/F to 1/F at a higher speed than normal;
   2. He felt the centre of gravity went up when the Lift fell;
   3. The Lift “hit the bottom” and bounced back on the springs underneath the Lift and then it got stuck;
   4. He felt dizzy and was in shock;
   5. Because of the jerk of the Lift, his whole body was shaken; and such jerk injured his back and neck;
   6. His back hit the walls/sides of the Lift;
   7. He did not fall to ground and landed on his feet;
   8. He was holding a trolley in his hand during the fall and he still hang on to it after the fall;
   9. He sat on the floor afterwards until he was rescued by the firemen, at which point he came to know the Lift was stuck between 1/F and 2/F.
6. P repeatedly said that he felt his life was at risk at the time and that he felt very painful after the Accident.

*Documentary Evidence*

1. Mr Tsui relied heavily on LE27 and LE29, which were filed by Homechant and AEEL respectively with EMSD. Such documents do not support P’s allegation of “sudden fall and bouncing back”, as the documents only recorded “a person was trapped inside the Lift and the Lift door did not open”.
2. However, D2 did not call anyone from Homechant or AEEL to explain the content of these documents.
3. Mr Gidwani has helpfully highlighted the following:

| Document | Date | Description of the Accident |
| --- | --- | --- |
| Form LE27 filled in by Homechant | 11 March 2014 | “When the lift reached 1/F, door did not open with (a) person trapped.” |
| Form LE29 filled in by AEEL | 17 March 2014 | “(5) Brief Description of the Incident and Damage Incurred…  … a man travelled from upper floor downward, when the lift arrived at 1/F, the lift door was unable to open and the man was trapped…” |
| Lift Malfunction Records | For entry on 10/3/14 | “困人… 消防放人，暫停，明天跟進” |
| Hong Kong Fire Services Incident Report | 17 October 2017 | “opened the landing door… opened the lift car door… rendered ambulance aid to a male adult who felt unwell…” |
| Form 2 filled in by D1 | 17 March 2014 | “Employee was trapped in a lift after goods delivery, there was a minor fall of the car of elevator” |
| AEEL Log Book | Various | “到達消防已放人. 有一乘客不適召救護車. 現暫停再作檢查”  “11/3/2014 檢查後，所有安全迴路 內外門閘鎖平層面一切正常…” |

1. In paragraph (9) of LE 29, it is stated by AEEL that:

“After full checking by our maintenance mechanic, there was garbage found on 1/F landing door sill. As the car door and landing door system were installed for more than 40 years, wear and tear found on most of the mechanical components, minor garbage would affect the smoothen of the door operation and the mechanical inter-linkage between the car door and the landing door then jammed and the lift door remained in close situation.”

1. Paragraph 10 of LE 29 states:

“To prevent the same incident happened in future, we recommend to conduct major alterations by replacing the existing car door system and landing door system with a new system. The relevant recommendation had been prepared and relevant quotation had been sent to property management company on 2013-4-3 with our letter ref. AEE/041110/QT/WHL.”

1. The Lift Malfunction Record (prepared by AEEL), covering the period from March 2014 to February 2019, which was produced by Charles in his witness statement, contains the following:
   1. March 2014 : 6 incidents (including 2 “person trapping” incidents re Lift L2 and 1 “door unable to open” incident re L2);
   2. April 2014 : 5 incidents (including 2 “person trapping” incidents re L2);
   3. May 2014 : 3 incidents (including 1 “person trapping” incident re L2 and 2 “door unable to open” incidents re L2);
   4. June 2014 : 5 incidents;
   5. August 2014 : 1 incident;
   6. September 2014 : 3 incidents (including 1 “person trapping” incident re L2);
   7. October 2014 : 4 incidents;
   8. November 2014 : 5 incidents (including 1 “person trapping” incident re L2);
   9. December 2014 : 6 incidents;
   10. January 2015 : 6 incidents (including 1 “person trapping” incident re L2);
   11. February 2015 : 1 incident;
   12. March 2015 : 7 incidents (including 2 “person trapping” incidents re L2); and
   13. April 2015 : 1 incident.
2. Apparently, there was no more malfunction incidents after April 2015 up to February 2019.
3. As noted by Mr Gidwani, the Malfunction Record as exhibited by Charles starts at p6. It would seem there should have been p1 to p5 and that D2 did not disclose malfunctioning incidents, if any, preceding the Accident on 14 March 2014.
4. In this respect, Charles said that he did not know if there were in fact pages 1 to 5. He could not tell whether there were any malfunctioning incidents prior to March 2014.
5. He was cross-examined by Mr Gidwani on the 31 August 2009 management committee minutes, which shows that there were discussions on interior renovation and replacement of car doors for the 2 lifts in Daily House.
6. He confirms that as early as 2009, AEEL suggested “main machines to be replaced so that the lifts could be more stable”.
7. However, it was not done at the time. The lifts were replaced when Daily House underwent a major renovation for the entire building in 2015/2016.

*Medical Evidence*

1. P himself did not file any expert report for his injuries but relied on the reports from his treating doctors at the government hospitals.
2. He relies on the assessment by MAB under Form 7, which assessed loss of earning capacity at 4% for “neck and back sprain resulting in neck pain and stiffness and back pain and stiffness”.
3. He disagreed with the findings of Dr Fu Wai Kee, orthopaedic expert engaged by D2.
4. Dr Fu examined P and prepared a report dated 28 November 2019.
5. Pursuant to an Order dated 19 July 2021, P has agreed by consent that Dr Fu’s report would be admitted as evidence without calling Dr Fu.
6. However, P repeatedly said during the course of trial that he wanted Dr Fu to come to court. Further, P insisted that he never told Dr Fu anything despite what Dr Fu has written in his report, as all the information was provided by D1 to Dr Fu.
7. I do not accept what P said. Had he really wanted to cross examine Dr Fu on his report, he must have informed the court on 19 July 2021. At the very least, he would have applied to vary the Order before trial if he was minded to do so.
8. Further, it is absurd to say that Dr Fu got all the information from D1 in order to prepare his report. P attended examination by Dr Fu in the company of an interpreter Mr Sajid Khalil. Also, as I have noticed, P is clearly able to communicate in Cantonese (as he himself said so in his witness statement). There is no reason for Dr Fu to conduct the examination without any input nor information from P himself.
9. It is also apparent from the report that Dr Fu has conducted examination on P and reviewed all the medical notes and reports from P’s treating doctors.
10. Also, Dr Fu is engaged by D2. I do not see why Dr Fu would take instruction or information from D1 directly.
11. Dr Fu is an experienced orthopaedic expert, whose expertise is unchallenged. Dr Fu’s opinion has been referred to in court many times before and he has signed the Declaration at the end of the report. I am convinced that Dr Fu have conducted the examination by reviewing the full medical history and taking information from P, and that he had reached his professional opinion on those basis.
12. I have no reason not to accept Dr Fu’s opinion in full.
13. Dr Fu’s findings can be summarized as follows:
    1. The plaintiff said that on 10 March 2014, when he entered the lift, *the lift rapidly fell from 3/F to G/F and then shot up between the G/F and 1/F. He fell onto the floor and landed on his back.* As a result of the accident, he suffered from neck and back injury.
    2. According to the medical report of Dr Chan Kin Ling, the plaintiff attended the A&E Department of QEH on 10 March 2014. *He complained of neck and back sprain injury when the lift suddenly descended from 2/F to 1/F.* He complained of neck and back pain.
    3. From the description of the plaintiff, his clinical picture is compatible with the *diagnosis of soft tissue injury of neck and back. These should be the result of the alleged incident happened on 10 March 2014 if the described accident really has happened as described.*
    4. On the other hand, according to description of the plaintiff the injury he sustained should not be serious. He just fell inside a lift that was moving and landed on multiple sites. He said the lift fell from 3/F to ground floor while according to A&E notes it fell from 2/F to first floor. *The energy of trauma should not be high and the force to each site should be a low one.* There was no sign of significant trauma such as bruise and swelling. There was just reported tenderness over the injured areas. The absence of bruise and swelling indicates that the injury he sustained, even if present, should be of mild degree.
    5. For the neck and back injury, from the medical notes during the multiple consultations in first few months after the injury it was repeatedly documented he had no limb symptoms. There was just mild tenderness in neck and back. There was no genuine neurological deficit. He could walk unaided. All these indicates that he just had very mild symptoms during the first few months after the accident.
    6. However he gradually complained of left lower limb symptoms He said it only appeared in 2016. From the time of presentation *his limb symptoms cannot be caused by the alleged accident.*
    7. X ray and MRI revealed mainly degenerative changes in his neck and back. These must be pre-existing that cannot be caused by one single trauma. However judging from the severity of the degenerative changes most likely he should have some pre-existing neck and back pain. *His present complaints should be due to natural progression of his pre-existing degeneration.*
    8. In consideration of the 3 possible scenarios of pre-existing condition, P falls under scenario 2, that there is a strong possibility that some other event, or natural progression of the condition, would have brought about the plaintiff’s present state. Dr Fu’s estimate is that the alleged accident should be considered as having advanced his neck and back pain by an estimated duration of 3 years.
    9. The plaintiff said the pain did not improve with treatment and was actually getting worse. *His complaints are not compatible with the natural course of injury and should not be genuine. If he had deterioration of symptoms with treatment the clinical condition is more compatible with degeneration.*
    10. Upon examination, there was no abnormality in his neck and back except reported tenderness and minimal active movement. There was no loss of lordosis and no paraspinal muscle spasm. The absence of these objective signs showed that the pain should be of a minor degree. *He should have well recovered from the injury long time ago.*
    11. Physical examination revealed there was no associated muscle wasting or signs of myelopathy. He was positive in all the non-organic signs. There should be high non-organic component in his complaints.
    12. The plaintiff has received appropriate treatment. He has reached maximal medical improvement long time ago and no further treatment should be required.
    13. He should be *able to return to his original work.*
    14. This kind of minor injury patients *should not need more than six months of sick leave and rehabilitation.*
    15. For the possible mild residual pain in his neck and back, the impairment of whole person should be 2%. The loss of earning capacity should also be 2%.
14. In short, Dr Fu’s view is that P suffered a soft tissue injury to the back and neck which should be well recovered long ago. P’s complaint is considered not genuine and his clinical condition is more compatible with pre-existing degeneration, although Dr Fu did not specify what percentage P’s condition is caused by such pre-existing degeneration.

*Discussion*

*How the Accident Occurred*

1. The principles for assessing credibility of witnesses were well settled, as recently summarized by Recorder Yvonne Cheng (as she then was) in *The Joint and Several Trustee of the Property of Yeung Wing Sing v Yeung Wing Sing* [2021] HKCFI 2018, which I shall not repeat.
2. P’s evidence is that the Lift suddenly fell to the bottom and bounced back up.
3. P referred to various reports from his treating doctors which recorded what he described to the doctors. This cannot be treated as evidence in support of P’s version.
4. On the other hand, P’s version of events is not supported by the documents referred to under *Documentary Evidence* above.
5. I agree with Mr Tsui that if the Accident did occur as P said, one would expect that there to be some structural damage to the Lift.
6. If so, it would have been recorded in the documents cited above, at least in the Fire Services Incident Report.
7. Further, it is clear from Dr Fu’s report that his injuries are minor and the energy of trauma should not be high. It is consistent with the findings of the medical reports and notes of P’s treating doctors.
8. I do not find P to be a credible witness. He grossly exaggerated the magnitude of the Accident and the extent of his injuries. I do not accept his evidence.
9. Mr Gidwani invites this court to find as a fact that on 10 March 2014, P experienced a sudden descent of the Lift which stopped with a slight jerk causing him slight soft tissue injuries with insignificant residual disabilities. The perception of a slight jerk, according to Mr Gidwani, could be a result of the Lift coming to a halt.
10. In the absence of any expert evidence on the mechanism of the Accident, Mr Gidwani’s observation is entirely logical.
11. As the Lift descended and came to a sudden halt, one would expect there to be an upward motion, which would well be interpreted as a jerk. This is just common sense. I am prepared to accept that the emergency braking system pleaded by D2 was in place, otherwise the Lift would have fallen to the bottom of the shaft which would have been catastrophic.
12. Considering all the evidence before me, I find that it is more probable than not that when the Lift descended from 3/F, it came to a sudden halt.
13. I further find that such sudden halt did create, in P’s word, a jerk, and such jerk did cause soft tissue injuries to his neck and back as suggested by Dr Fu. And, as the door could not be opened, P was trapped inside until he was rescued by the firemen.

*Conclusion on Liability*

1. In the premise, P failed to prove that the Lift “rapidly fell from 3/F to 1/F and then shot up between 1/F and 2/F as pleaded.
2. However, it does not necessarily mean the P’s case must fail against D2.
3. In *Poon Hau Kei v Hsin Chong Construction Co Ltd* [2004] 2 HLRD 442, the question for the CFA is whether the trial judge was correct in proceeding and finding liability against the 1st defendant on the basis of a version of facts which was different to that advanced by the plaintiff or whether he should in the circumstances have dismissed the claim.
4. The CFA upheld the decision of the trial judge who found the 1st defendant liable to the plaintiff on a scenario pleaded by the 1st defendant. Bokhary PJ held:

“19. Provided that it does so in a fair manner, a court is entitled to decide in favour of a party on the basis of a scenario that he has not pleaded but his opponent has pleaded. …… “I fail to see how [the defenders] can have been in any way prejudiced when the facts upon which liability was established are those averred in the defences and spoken to by their witnesses in evidence”.

20. …… I am of the view that the pleadings accommodate the trial judge’s findings as to how the damage was caused and how the responsibility for it is spread. And it is to be noted that both sides proceeded at the trial on the basis that each of them could be held partly responsible for the damage on the light trough scenario.

…

24. …… the trial judge said that the light trough scenario had been fully canvassed in evidence and submissions by the parties [and that there was] no prejudice to anyone.” (emphasis added)

1. As D2 pleaded in its Amended Defence, I have found that P was trapped inside the Lift, which stopped as it was descending from 3/F. This was fully canvassed in evidence and submissions by the parties and there was no prejudice to anyone, especially D2.
2. As to what caused the Lift to stop while descending, Mr Tsui argued that the court should not expect D2 to be able to discover potential defects in the Lift, unless it was told by Homechant and AEEL.
3. Mr Tsui further argued that an occupier does not need to guarantee the safety of its visitors. An occupier is not liable if it has in place a reasonable system to protect visitors against the type of damage it can reasonably foresee to happen on the visitors: *Yau Tsz Hin v Broadway Theatre Co Ltd*, HCPI 674/2010.
4. On the other hand, Mr Gidwani argued that the fact that D2 had engaged Homechant to assist D2 in its management of the Daily House and AEEL for periodic inspection or maintenance of the Lift does not extinguish D2’s personal duty of care towards P.
5. Mr Gidwani further agrued that it is not necessary for P (in the main action) or D1 (in the contribution proceedings) to prove that D2 should reasonably foresee the precise manner that the accident had happened in order for a duty of care to arise. D2 would be held liable if the evidence shows that D2 had failed to take such reasonable steps and that P was injured (in the general sense) as a result of the failure.
6. From LE29 and as pleaded by D2 under paragraph 7(j) of D2’s Amended Defence, garbage was found on 1/F door sill which affected the smoothness of the lift door operation and caused the mechanical inter-linkage between the lift car door and landing door to be jammed, resulting in the lift door remained shut.
7. Paragraph 7(k) of the Amended Defence went on to state that Homechant had failed to keep the common areas clean which resulted in the Accident.
8. It is clear that it is D2’s own case:
   1. The presence of garbage is a cause of P’s Accident; and
   2. This is due to the fault of Homechant.
9. However, D2 did not issue any Third Party Proceedings against Homechant.
10. Mr Gidwani refers to the full provisions of s3(4)(b) of OLO which reads:

“where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.” (emphasis added)

1. The evidence of Charles and Pauline is that the cleaning of Daily House was sub-contracted out to cleaners who were contracted by Homechant on D2’s behalf. There was a cleaning schedule adopted.
2. But such evidence is unable to show what steps the IO has taken in order to satisfy itself that Homechant was competent and that the work (in relation to cleaning) had been properly done.
3. Also, Charles was not the chairman at the material times and was not able to give any useful evidence regarding the state of management of Daily House and how Homechant performed.
4. It is D2’s evidence, as contained in LE29, that the Lift was 40 years old and wear and tear were found on most of the mechanical components.
5. More importantly, D2 was aware of the following:
   1. The need to replace the car door of the Lift was discussed back in August 2009 management committee meeting (see: 31 August 2009 minutes of meeting); and
   2. AEEL’s proposal to replace the relevant system on 3 April 2013 (see: para 10, LE29).
6. I agree with Mr Gidwani that had the renovations in 2009 been implemented, AEEL would not have reported in the LE29 that wear and tear were found on most of the mechanical parts of the Lift.
7. Replacement of the lifts was only carried out in 2015 or 2016 when the whole building of Daily House was renovated. It also explains why there was no more malfunction incident after April 2015.
8. The fact that D2 was notified by P’s Accident by MMC at a late stage is neither here nor there. Proper maintenance of the Lift and cleanliness of the common area is an ongoing duty for the responsible person and the occupier.
9. I find it is more probable than not that the Accident occurred as a result of malfunction of the Lift, and such malfunction was caused by:
   1. The presence of garbage on 1/F door sill; and
   2. The poor state of the Lift as at 10 March 2014 due to failure to maintain and repair the Lift despite AEEL’s recommendation.
10. D2 blamed Homechant for its failure to supervise the maintenance of the Lift by AEEL. At the same time, it is D2’s stance that AEEL was a competent contractor.
11. What is clear is that AEEL did identify the problems with the Lift (or lifts) as early as 2009 and did make recommendation for new system in 2013. Neither was acted upon by D2. It is clear from the Lift Malfunction Record that lift incidents (including person trapping and lift stopping) kept occurring after 10 March 2014. Similar incidents apparently stopped after April 2015. It is more probable than not that it was due to the fact that the Lift was replaced during the major renovation of Daily House in 2015/2016.
12. In the premises, it was the negligence of D2 in: (a) failure to maintain the Lift clean; and (b) failure to maintain and repair the Lift, that caused the Accident. D2 also failed to discharge its statutory under LEO and OLO.
13. I do not find any evidence which suggests contributory negligence on the part of P.
14. I find that D2 is wholly liable to P’s injuries and damages.
15. In the premises, I also find that D2 is liable to contribute to or indemnify D1 under ECO and CLCO for the compensation made to P under DCEC 171/2016 together with the costs in defending the said proceedings.
16. The sums claimed by D1 (which are not disputed by D2) are as follows:

EC Amount paid to P $338,000

P’s own costs $40,000

D1’s costs $21,760.40

Interest $106,602.66

Total: $506,363 (round up)

1. I order that D2 do pay D1 the sum of $506,363 under the Contribution and Indemnity Proceedings.

*Quantum*

1. The plaintiff in his (Revised) Statement of Damages claims the following:

PSLA

Pre Trial Loss

29.5 months x HK$12,700 salary received $270,000.00

4% Future Loss + salary received $89,741.00

Post Trial Loss of Earnings

HK$12,700 x 12 x 26 (multiplier) $3,962,400.00

Future Loss of Earnings: 4% from Compensation (Ordinary Assessment) Board

*PSLA*

1. P did not specify the amount of PSLA and said he would “leave it to the court”.
2. Mr Tsui simply said that as P did not plead any specific amount, he should not be entitled to PSLA at all.
3. Mr Gidwani refers to Dr Fu’s evidence that the Accident had advanced P’s neck and back pain by an estimated duration of 3 years, and that P’s pre-existing degeneration would have naturally progressed into P’s current state.
4. Dr Fu did not specify the percentage attributable to P’s pre-existing condition.
5. Mr Gidwani suggested a discount of 15% under *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958 is appropriate.
6. The following cases are relied upon by Mr Gidwani (without *Chan Kam Hoi* reduction):
7. In *Yau Po Shan v The Express Lift Co Ltd and Anor* [2019] HKDC 1495, the plaintiff sustained soft tissues injuries at a lift accident. Examination revealed tenderness over neck, low back and right ankle regions. Cervical spine X-ray showed no fracture. PSLA was assessed at HK$180,000; and
8. In *Tong Chun Yip v Leung Sai Lau* [2019] HKDC 48, the plaintiff suffered from a soft tissue neck and back injury at a traffic accident. MRI of cervical spine showed no nerve compression but only minimal disc protrusion of the C3/4 disc. The court considered these as uncomplicated “whiplash” injuries and awarded HK$120,000 for PSLA.
9. Mr Gidwani submits that pre-*Chan Kam Hoi* damages for PSLA should not exceed $150,000. Adopting a 15% reduction, PSLA should become:

$150,000 x (100% - 15%) = $127,500

1. Considering all the evidence before me, I am satisfied that PSLA, without any discount for the pre-existing degeneration, should be no more than $150,000. I agree that 15% discount is reasonable to reflect P’s pre-existing degeneration.
2. I award PSLA at $127,500 accordingly.

*Pre-Trial Loss of Earnings*

1. Mr Gidwani agrees that P could earn $12,700 each month, which is the figure pleaded in the (Revised) Statement of Damages. Mr Tsui does not admit the same but no contrary evidence is adduced by D2.
2. I accept that P’s monthly earnings was $12,700.
3. P was granted sick leave by his treating doctors for the period from 10 March 2014 to 4 August 2016.
4. It is trite that the court is not bound by the period covered by medical certificates. The court is entitled to, and should, consider all the medical evidence available.
5. Dr Fu’s opinion, which both Mr Gidwani and Mr Tsui agree, is that the appropriate length of sick leave is 6 months. Considering P’s minor injuries, I accept Dr Fu’s view.
6. Mr Gidwani further allows 3 more months as grace period for P to look for a job after end of sick leave.
7. It is reasonable and indeed normal to allow a few months grace period for a plaintiff to look for a job after expiry of sick leave. I shall allow 3 months as suggested.
8. P’s damages for Pre-Trial Loss of Earnings (with MPF) is thus:

$12,700 x 9 months x 1.05 = $120,015.

*Future Loss of Earnings & Loss of Earning Capacity*

1. Dr Fu is of the view that P can resume his pre-accident job.
2. P insisted that he was unable to work at all. This is contrary to Dr Fu’s opinion.
3. Both Mr Gidwani and Mr Tsui submit no damages should be awarded under these two heads.
4. Further, as revealed under cross-examination, P received CSSA in a total sum of $12,000, which is more or less his pre-accident income.
5. It is more P’s lack of incentive to take up any employment rather than a real handicap that prohibits him from returning to the labour market.
6. Further, as noted by Dr Yap of the Department of Anaesthesia of Caritas Medical Center in her report dated 5 March 2019, P declined offers of pain nurse education and exercise therapy and was not receptive to active rehabilitation.
7. It is up to P to help himself in his road to recovery. Indeed, P has the duty to mitigate his loss by taking up employment.
8. I will disallow the claim under these 2 heads.

*Summary on Quantum*

1. P is entitled to damages as follow

PSLA $127,500.00

Pre-Trial Loss of Earnings (with MPF) $120,015.00

Future Loss of Earnings NIL

Loss of Earning Capacity NIL

$247,515.00

1. Credit has to be given to the sum of $338,000 received under DCEC 171/2016.
2. P effectively would not be entitled to any damages in the present proceedings as his ECC settlement sum exceeds the damages recoverable.

*Conclusion*

1. I therefore dismiss P’s claim against D2.
2. P’s case is dismissed against both D1 and D2.

*Costs Order Nisi*

1. As P failed to prove his claim against D1 under the main action, I order P do pay D1’s costs, with Certification for Counsel, to be taxed if not agreed.
2. As for costs between P and D2 in the main action, although D2 is found liable to P, P’s case is dismissed as damages fall below the EC settlement sum.
3. I order P do pay D2’s costs, with Certification for Counsel, to be taxed if not agreed.
4. As for the costs of the Contribution and Indemnity Proceedings between D1 and D2, I order D2 do pay D1’s costs, with Certificate for Counsel, to be taxed if not agreed.
5. The above costs order would become absolute unless parties apply to vary in writing within 14 days of handing down of judgment.
6. I am grateful for Counsel’s assistance.

( Rebecca Lee )

Deputy District Judge

The plaintiff appeared in person

Mr Victor Gidwani and Mr Conan Shek, instructed by John Lam, Law & Co, for the 1st defendant

Mr Brian Tsui, instructed by CW Chan & Co, for the 2nd defendant