## DCPI 1030 /2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1030 OF 2005

--------------------

##### BETWEEN

|  |  |
| --- | --- |
| YEUNG SHAN YEE SANDY | Plaintiff |
| And |  |
| SINGWAY (B.V.I.) COMPANY LIMITED | 1st Defendant |
| HOPEWELL PROPERTY MANAGEMENT COMPANY LIMITED | 2nd Defendant |

--------------------

Coram: Deputy District Judge S. T. Poon in Court

Date of Hearing: 13th –14th June 2006

Date of Handing Down Judgment: 24th July 2006

JUDGMENT

Background

1. The Plaintiff fell at the entrance of Hopwell Centre (“the Building”) and sustained personal injuries. The 1st Defendant is the owner and the 2nd Defendant the managing company of the Building.
2. The Plaintiff’s case is that on the day in question, which was a Saturday morning, she was on her way to the company she worked which was situated on the 22/F of the Building. As usual, she took the entrance facing Kennedy Road on 17/F of the Building. Her husband drove her to work on that morning and she alighted their vehicle at the said entrance. While she was walking up the marble steps leading to and immediately in front of the said entrance, she slipped and fell onto the steps.
3. The Plaintiff alleged that she felt that the steps were wet when she touched the steps after she fell.
4. After the accident she was admitted to the Accident and Emergency Department of Ruttonjee and Tang Shiu Kin Hospital. She was found sustaining injuries on her forehead and nasal area. Her nasal bone was fractured.
5. It is alleged that the accident was caused by the negligence and/or breach of duties under the Occupiers Liability Ordinance, Cap. 314 and in common law on the part of the Defendants.
6. The Defendants gave another version of what actually happened. They also denied negligence and pleaded contributory negligence on the part of the Plaintiff herself.
7. According to the evidence of 2 employees of the 2nd Defendant, who were allegedly witnessing the accident, the Plaintiff was in fact tripped over at the kerb to the drop-off area for passengers. The kerb was painted yellow.

Evidence

1. The Plaintiff and her husband gave evidence. The Plaintiff gave an account of how she fell on that morning and her husband gave evidence to contrast the Defendants’ allegation that the Plaintiff was alighted in the third lane from his vehicle.
2. The Plaintiff said after she alighted from the vehicle, she took a lab-top computer from the back seat of the vehicle and walked towards the entrance with the computer in her left hand. She stepped with her right foot onto the first step of the marble step, but when she was trying to put her left foot onto the second step her right foot slipped and she fell forward and landed with her face. When she tried to support up with her hands, she felt the marble step wet and damp, like it was just being mopped and not dried yet.
3. Their evidence was basically unshaken in cross-examination. However, in relation to the question of whether the marble steps were wet at the time, the Plaintiff admitted that she did not actually see that they were wet but she felt that they were at the time when she tried to use her elbows to get up after she fell. She also said that she was bleeding and in great pain. Someone tried to help her up but she used her hands to press on her wound lying on the ground. She did not remember whether she complained about the wetness of the steps at the time, she was just thinking about the fact that she was disfigured. She admitted that she did not complain to the Defendants about the wetness of the steps after she returned to work.
4. The Plaintiff agreed that she was able to see the marble steps at the time and the accident was not caused by her being unable to notice the steps.
5. The 2 employees of the 2nd Defendant who gave evidence were respectively the property management officer (“Yu”) and property management assistant (“Yip”) of the 2nd Defendant. They were on duty at the said entrance at the material time supervising the traffic.
6. According to Yip, the traffic at the entrance was busy on that morning. He noticed the Plaintiff when she alighted from her husband’s vehicle at the third lane from the kerb. The Plaintiff was walking in a fast pace and one of her feet tripped on the kerb when she reached there. She stumbled forward for a few steps and fell with her face hitting the marble steps.
7. In his statement he has a rather detailed description as to the manner of the Plaintiff walking from the third lane towards the kerb. The description is that “I saw the Plaintiff walking in a rather fast pace. As there was a taxi stopping on the 1st Lane, the Plaintiff halted on the road for a moment and continued walking hastily after the taxi departed.”
8. However, he did not notice the Plaintiff taking a lab-top computer from the vehicle.
9. Yu said he first noticed the Plaintiff when she moved close to the pavement. He saw her tripped at the kerb and stumbled a few steps forward. He intended to save her but he was not quick enough. He saw her fell onto the ground and her face hit the first and second steps at the upper part of the marble steps. He helped her up and saw her nasal bridge and forehead bleeding. He immediately carried out first aid to stop the bleeding and later on an ambulance arrived and the medical officers took over. The Plaintiff had a lab-top computer with her at that time.
10. It was not raining at the time and he had checked after the accident that the ground of the road, pavement and marble steps were dry. The Plaintiff had never complained to him that the marble steps were wet.
11. In cross-examination, Yu said that there was a CCTV tape recording of the entrance made on the morning of the accident and was kept in the control room by the management office. He also said that there were statements given to the loss adjusters and an incident report to the manager. Nothing of the above had been disclosed by the Defendants.
12. The Defendants obtained a weather report from the Hong Kong Observatory showing that there was no rain at the area in the period from 9:00 p.m. the previous night to 9:00 a.m. that morning.

Findings of fact

1. In relation to the location where the Plaintiff fell, I find the version of the Defendants’ witnesses not reliable. Firstly, there is no reason why Yip would pay particular attention on the Plaintiff or the vehicle she was in before the accident happened, given that according to Yip, that was a busy morning.
2. Secondly, if Yip had in fact paid special attention to the Plaintiff when she alighted from the vehicle that enabled him to describe the movements of the Plaintiff in such details, Yip would not have been unable to notice the Plaintiff taking the computer from the vehicle.
3. Furthermore, I see no reason why the Defendants did not disclose the statements of the witnesses to the loss adjustors or at least the internal report. This certainly prejudiced the reliabilities of the Defendants’ accounts.
4. Last but not least, there is no reason why Yu would check whether the marble steps were wet should the accident happen at the kerb rather than the marble steps.
5. Accordingly, I find as a fact that the Plaintiff fell when she was stepping on the marble steps.
6. As regard whether the marble steps were wet at the material time, the burden rests on the Plaintiff to satisfy me that indeed they were on balance of probabilities. The fact that the Plaintiff fell or slipped does not necessarily mean that the steps were wet.
7. The Plaintiff did not actually see that the steps were wet or damp. She only felt that they were wet at the time when she tried to get up with her elbows. Her description of the wetness or dampness was “like just being mopped and not dried yet”, the degree of wetness, if any, was slight.
8. My view is that, it would be highly improbable, if not impossible, for one to feel such slight degree of wetness with one’s elbows. The surface of marble gives a feeling of coolness when one touches it. It would be very difficult for one to tell in any degree of certainty the difference of the feeling of mild dampness from the feeling of coolness with one’s elbows.
9. The Plaintiff did not remember whether she complained at scene about the wetness. Yu said she did not. I am of the view that she probably did not, otherwise she would have remembered. If she did Yu would also have recorded it in the occurrence book.
10. The Plaintiff stayed at the scene for some time before the ambulance arrived. She was assisted by Yu who was someone from the management office. If the Plaintiff really felt that the steps were wet at that time, it would be unreasonable that she did not mention it at all to anybody then. As submitted by Miss Lau, counsel for the Defendants, it is important to note that the Plaintiff made such an accusation only about 3 ½ years after the accident.
11. It was not raining on that day, it was a day in November and there was nothing to suggest a particularly high humidity (Save perhaps the suggestion of the Plaintiff that there were clouds in the sky). There is no evidence that the steps had just been mopped.
12. Mr. Sakhrani, counsel for the Plaintiff, suggested to Yu and Yip that many people used the 17/F entrance as a short cut from the Wan Chai wet market to Kennedy Road. Apparently he was suggesting that the purchases from the wet market might be a cause of the wetness. However, it is in my view a rather speculative proposition and cannot in any way help to prove that there was in fact wetness on the marble steps.
13. In the circumstances, I am not satisfied that the marble steps were wet or damp at the time of the accident.

Liability

1. It can be seen from the particulars of negligence given under the Statement of Claim that the case of the Plaintiff premises mainly on the fact that the steps were wet that caused her slipped.
2. Although it is alleged that the Defendants have failed to ensure that the boundary or edge of each of the steps is conspicuous enough and that each of the steps appears clearly to users as a distinct step, it was however agreed by the Plaintiff that she did notice the steps at the material time.
3. Mr. Sakhrani referred me to the case *Ward v. Tesco* [1976] 1 WLR 810 where Megaw LJ said that “*when a plaintiff shows an unusual event has occurred which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault, the defendants can escape from liability if they can show that the accident must have happened even if there had been in existence a proper and adequate system*.”
4. For the present situation, with my findings of fact above, I do not think that the Plaintiff showed an unusual event more consistent with fault on the part of the Defendant than the absence of fault. People do slip or fall for reasons unknown in daily life. The mere fact that someone has slipped or fallen does not call for an explanation from the occupier of the place where it occurs to disprove his negligence.
5. In *Lee Kit Ha v The Kowloon Motor Bus Company (1933) Limited*, HCPI No. 539 of 2000, Deputy High Court Judge Carlson observed that “*provided the plaintiff had shown that she slipped on a patch of oil or other greasy substance in the circumstances that she described, then the onus would have shifted to the defendants to demonstrate that they had taken all reasonable steps to ensure that their premises were as safe as might be reasonably expected in all the circumstances.*” (at page 5, paragraph 14.)
6. Here, as the Plaintiff failed in proving that the marble steps were wet, the onus does not shift.
7. In the circumstances, I conclude that the Plaintiff has failed to prove that the Defendants were negligent and the Plaintiff’s claims ought to be dismissed.
8. Should the Plaintiff be able to prove that the steps were wet when the accident happened, the onus would shift to the Defendants to prove that they had taken all reasonable steps to ensure that their premises were safe.
9. Here I agree with Mr. Sakhrani that the Defendants did not even plead in their Defence that they have done so. Although the Defendants attempted to achieve this by showing to the court the contract with a cleaning contractor for the Building, there was no evidence to prove that the cleaning schedule had been complied with on that morning.
10. Should I found that the marble steps were wet on that morning, I would have found the Defendants negligent.
11. Although I have found that the Defendants are not liable to the Plaintiff’s claims, for completeness I would also give my decision in relation to quantum.

Quantum

1. According to the Revised Statement of Damages filed by the Plaintiff, physical examination revealed that there were lacerations over the forehead and the nasal area and bruises over the nasal bridge. There was also fracture of the nasal bone. She was treated with suturing of lacerations. She was then transferred to the Department of Neurosurgery of Pamela Youde Nethersole Eastern Hospital (“PYNEH”) and no neurological deficit was revealed. X-ray of the nasal bone showed depressed nasal bone fracture. Closed reduction of her fractured nasal bone was performed under local anesthesia.
2. The Plaintiff was hospitalized from 9th November 2002 to 12th November 2002 inclusive. She was granted sick leave from 9th November 2002 to 29th November 2002. After discharge from hospital, she has been attending the Specialist Out-patient Department of PYNEH for follow-up consultations and treatment for her nasal injuries.
3. Apart from attending follow-up consultations and treatments at PYNEH, the Plaintiff has also been attending consultations with private specialists for her nasal injuries and cosmetic injuries. She has also received laser cosmetic treatment to improve the scars on her forehead and nose.
4. On examination by the joint expert of parties in Otorhinolaryngology, Dr. Lo Siu Sing, it was found that:-
   1. The Plaintiff has the problem of nasal obstruction and clear rhinorhoea.
   2. There was a 5 cm inconspicuous transverse scar over her forehead.
   3. The nasal bridge was slightly depressed on the left side.
   4. The nasal septum was deviated to the left side opposite the middle turbinate.
   5. The inferior nasal turbinates were hypertrophic and enlarged.
5. Dr. Lo advised that:-
   1. The depression on the left side of the nasal bridge might be improved by cosmetic rhinoplasty. The operation cost is about HK$50,000.00. The nasal deformity caused 1 % permanent deformity or loss of earning capacity to the body as a whole.
   2. The accident caused deviated nasal septum. Allergic rhinitis leads to hypertrophic nasal turbinates and rhinohoea. The deviated nasal septum and the enlarged nasal turbinates caused nasal obstruction. The accident probably precipitated the onset of symptoms of nasal obstruction and rhinorhoea. The symptoms could be controlled by medicationand significantly improved by surgery. Septoplasty and nasal turbinectomy cost about HK$25,000.00. The nasal obstruction and rhinorhoea caused 1% permanent disability or loss of earning capacity to the body as a whole.
6. The Plaintiff was 44 years of age at the time of the accident and is now 48. She was working as a project secretary prior to the accident earning a basic salary of HK$16,500.00 per month. She is still in the same employment but the salary is now HK$13,500.00 per month.
7. The Plaintiff showed to the court the scars on her forehead and nasal bridge, which are now rather inconspicuous. According to the Plaintiff, at the time when she was discharged from the hospital, the scars were very red, uneven, swollen and bruise. She had to cover her head with a cap often. She felt the scars very ugly, she thought people were looking at her scars and she hid herself at home for the first half year. She was desperate.
8. The Plaintiff spent HK$12,000 for receiving treatment to the scars at a beauty salon. She also purchased a lot of cosmetic products to smoothen and whiten the scars. The colour of the scars is now faded and similar to that of the Plaintiff’s cheek. She now feels better about the scars and will not hide herself away anymore. She is prepared to do the surgery as advised by the doctors.
9. The Plaintiff claims for pain, suffering and loss of amenities (PSLA), pre-trial loss of earnings, loss of earning capacity, future medical expenses and special damages.
10. Subject to the court’s decision on liability, the Defendants agree to the amount claimed under pre-trial loss of earnings, future medical expenses and special damages except tonic food.

PSLA

1. Mr. Sakhrani referred to 2 cases (*Chan Tsz Sing v Lo Ching Pong,* unrep., CACV 176 of 2004 and *Lau Hing Kwan v Lai Chi Kwan & anr.,* unrep., HCPI 986 of 2003) and submitted that the proper amount of PSLA should be HK$300,000.
2. I agree that the injuries suffered by the plaintiff in *Chan Tsz Sing* were much less serious than the Plaintiff in this case. However, I do not share Mr. Sakhrani’s view that *Lau Hing Kwan* is a “slightly different” case.
3. In *Lau Hing Kwan*, the plaintiff had lost consciousness for 30 minutes following a traffic accident. There was a moon-shaped scar over his forehead and accompanied with that by three areas of traumatic tattoos over his nose. The scar was considered too wide to excise and expansiontherapy was undertaken. The medial end of the plaintiff’s right eyebrow has displaced downwards resulting in facial asymmetry and disharmony and surgical leveling of the eyebrows was performed. The cosmetic disability amounts to 5%. The plaintiff was awarded HK$280,000 under this head.
4. I am of the view that the injuries suffered by the Plaintiff were less serious than that of the plaintiff in *Lau Hing Kwan*. However, taking into account the fact that the Plaintiff is a woman who would presumably be more conscious about one’s appearance than a man, an award of HK$200,000 under this head would be reasonable.
5. I have considered the 2 District Court cases cited by Miss Lau, one of them being the same *Chan Tsz Sing* case and the other concerns scars not on the plaintiff’s face. I do not think they can be of any assistance.

Loss of Earning Capacity

1. The Plaintiff has remained in her pre-accident job since she resumed work after the accident. There is no evidence that she would be dismissed as a result of her physical condition.
2. The residual symptoms of the Plaintiff can be cured by the operation that she is prepared to undertake. I do not think the Plaintiff’s injuries will cause any disadvantages for her to compete with others in her field of work.
3. I would award nothing under this head.

Tonic Food

1. There is nothing from the Plaintiff justifying the sum of HK$20,000 for tonic food. However, I would award a sum of HK$10,000 under this head as a reasonable sum in view of the cosmetic injuries suffered by the Plaintiff.
2. The total amount of damages assessed is therefore:-

(a) PSLA 200,000

(b) Pre-trial loss of earnings 2,310

(c) Future medical expenses 75,000

(d) Special damages 29,332

Total: HK$306,642

Conclusion

1. In the circumstances, as the Plaintiff failed to establish the liabilities of the Defendants, the Plaintiff’s claims shall be dismissed.
2. I see no reason why costs should not follow the event. I make a cost order nisi that costs of this action be to the Defendant to be taxed if not agreed, with certificate for counsel. This order nisi shall become absolute 14 days after the handing down of this judgment.

(S. T. Poon)

Deputy District Judge

Mr. Ashok K. Sakhrani instructed by Messrs Li, Kwok & Law for the Plaintiff.

Miss Julia Lau instructed by Messrs Hastings & Co. for the Defendants.