## DCPI 1403 /2004

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSON INJURIES ACTION NO. 1403 OF 2004

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##### BETWEEN

LEUNG SUK YING, MAGGIE Plaintiff

### and

SERVICE PROPERTIES Defendant

MANAGEMENT LIMTIED

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Coram : H.H. Judge Chow

Dates of Hearing : 18th, 19th December, 2006 and 1st February, 2007

Date of handing down Judgment : 30th April, 2007

J U D G M E N T

1. This is the Plaintiff’s claim against the Defendant for negligence and breach of common law duty as an occupier. The Defendant disputes that it is so liable.

The accident

1. At around 8:55 a.m. on 2.12.2002 the Plaintiff slipped and injured her right knee at a dropped kerb on the pavement of a commercial development known as Taikoo Place at 979 King’s Road, Quarry Bay, Hong Kong. The Defendant was the manager of Taikoo Place. The dropped kerb was under cover. It was specially designed for access into the building complex by wheelchair users. It declined downwards towards the road to form a ramp for wheelchairs to go up the pavement and then into the building complex. On each side of the ramp there was an inclination downwards into the ramp from the pavement. The dropped kerb was covered with mosaic tiles whereas the surrounding areas of the pavement were covered with ceramic tiles.
2. The Plaintiff was wearing shoes with rubber soles that morning because she expected it to rain. When she came out of the MTR station and was on her way to enter Taikoo Place, she found that the pavement was slightly wet. It was raining at that time. She slipped at the dropped kerb. She fell and her right knee was injured.
3. The Plaintiff called Professor Courtney, a professor of the University of Hong Kong, to testify on the design and slip-resistance of the materials used on the dropped kerb. He wrote 3 reports about these matters.
4. Professor Courtney found that the dropped kerb was not safe in 5 areas:-
   1. the slippery nature of the tiles;
   2. the complex nature of the slope;
   3. the change of materials in the dropped kerb;
   4. the inappropriate anti-slip coating; and
   5. the absence of the 800 mm level space behind the dropped kerb.
5. Professor Courtney carried out his first test on 22.2.2004, about one year after the accident. By that time the dropped kerb in question had already been relocated. He could only “re-construct” the design of the dropped kerb in question from photographs seen by him.
6. At the material times, the dropped kerbs in Taikoo Place were coated with a customer made anti-slip system, comprising a specially modified silicon resin coating as the binder with quartz of approximately 1 mm applied to the surface. The silicon resin was intended to be used as a binder carrying the quartz which, when combined together, formed the custom-made anti-slip system. Professor Courtney was unable to comment on the effectiveness of this anti-slip coating and its wear characteristics. He said that by the time the accident occurred, the quartz layer might have been worn off. But this is not supported by any evidence.
7. Professor Courtney said that the silicon resin used on the dropped kerb was not intended to be a slip-resistant material, but he gave no evidence on the effectiveness of the use of quartz over the surfaces of the dropped kerbs. His evidence therefore does not assist the Court to determine the slip effectiveness of the system used.
8. The Plaintiff submits that according to Professor Courtney because of the lack of testing, the custom made anti-slip coating might not be very durable. Therefore it is likely that after 6 months, at the time of the accident, the anti-slip coating no longer provided sufficient protection for the dropped kerb. It is merely a speculation to say that the anti-slip coating might not be very durable. There is no evidence to support that. The lack of testing is one thing, whether the anti-slip is very durable is another. There is no evidence to prove that due to the lack of testing, the custom made anti-slip coating might not be very durable.
9. The Plaintiff submits that “according to DW4 Ma Wai Pun, the original dropped kerb was moved to the new location on October, 2003, which is shown in the pictures in [72]. Mr. Ma also confirmed that both the original kerb and the new wheel chair access used the same materials. Therefore, when Prof. Courtney was testing on the new wheel chair access as seen in [72], he was testing the friction of the same material as the original dropped kerb.” The slip took place on 2.12.2002; the original dropped kerb was moved to the new location in October 23. The first test carried out by the professor was on 22.2.2004. Even though the new wheel chair access used the same material as the original dropped kerb, the degree of friction of the original dropped kerb cannot be the same as the degree of friction of the new wheel chair access, as the degree of friction varies with the passage of time. On the other hand the original dropped kerb at the material time had a wet surface whereas the surface of the new wheel chair access on which Professor Courtney carried out the test did not have a wet surface. Thus the test carried out by Professor Courtney serves no useful purpose, as the test was not carried out on a wet surface.
10. Based on The photographs provided by the Defendant, Professor Courtney calculated the measurement of the dropped kerb. The Plaintiff submits that as all the tiles are of standard size exact measurement could be obtained. Therefore, relying on the number of tiles, Professor Courtney calculated the exact measurement of the dropped kerb. I do not accept this submission. How could the measurement of the dropped kerb slope be calculated by relying on photographs, which only have plane surfaces?
11. The Plaintiff submits that being the manager of Taikoo Place the Defendant would be able to provide the exact measurements of the dropped kerb if the professor’s measurements were to be challenged. By not providing such measurements it has failed to challenge the measurements calculated by Professor Courtney. Hence this Court could safely rely on the professor’s measurements on P.70 of the Trial Bundle in determining the dimension of the dropped kerb. Being the manager of Taikoo Place does not necessarily mean that they must have the exact measurements of the dropped kerb. There is no evidence to prove that it has the measurements of the dropped kerb. I do not accept such submission.
12. The causes of slip are complicated, involving various environmental and human factors. The expert evidence of Professor Courtney is only related to the design and slip-resistance of the materials used on the dropped kerb. He was not and could not determine all the relevant factors when the accident took place. Hence his evidence cannot carry weight in so far as the causes of the slip are concerned.
13. The Defendant submits that the rubber-soled shoes worn by the Plaintiff at the time of the accident was not tested by Professor Courtney. She could have been wearing shoes with slippery soles, or, without her knowledge, the soles could have been contaminated with slippery materials. This is a significant void in relation to causation which cannot be filled by the Plaintiff. I accept this submission.
14. Another important void in relation to causation is the effect of water on the surface of the dropped kerb. It is mere common sense that water would create slipperiness. At the material time the surface of the dropped kerb was wet. The water would make the surface of the dropped kerb slippery. The slippery surface must have reduced the anti-slip effect of the materials used on the dropped kerb and contributed to the slip and fall of the Plaintiff. The Defendant was not responsible for the slippery condition of the surface of the dropped kerb caused by water. Hence it cannot be liable for the slip of the Plaintiff.
15. Save and except for the presence of a 800 mm level ground behind it, the dropped kerb was designed according to the Design Manual issued by the Building Authority. The design is obligatory under the law, and it is not open to the Defendant not to comply with such obligation. The Plaintiff submits that such obligatory design requirements only provide the minimal requirements. The new design of the new wheel chair access clearly shows that a different design of wheel chair access is used, where the slope is not complicated. Therefore, the Defendant would be at liberty to use a different design rather than the complex design of the original dropped kerb. I do not accept such submission. The Defendant is obliged to comply with the statutory requirements. It is not obliged to do something more, hence it would not be wrong if it does no more than what it is required to do so by statute.
16. The Plaintiff submits that if there was a 800 mm space, the Plaintiff would be able to walk on a levelled surface and avoid the slope. Therefore because of the nature of the slope, which is inherently dangerous, and without the 800 mm space to walk on, the dropped kerb is not reasonably safe for the purpose. It is not the Plaintiff’s evidence that because of the lack of the 800 mm levelled space, she had to walk on the dropped kerb, thereby resulting in the slip. She could have simply avoided walking on the dropped kerb. It must be borne in mind that two years before the accident she had used that pavement, and she must have walked on the dropped kerb many times, without making a slip. So the absence of the 800 mm space cannot contribute to her slip.
17. The Plaintiff was very familiar with that part of the pavement on which the accident occurred. She was familiar with the existence and the nature of the dropped kerb. For the past two years she had been taking the same route to enter the building complex on her way to work. She said that she was taking care when she was about to step into the area of the dropped kerb. This shows that she was well aware of the change in material and the inclination of the pavement. I therefore accept the Defendant’s submission that the points about the sudden change in inclinations, and the change in materials on the surface of the pavement affecting the chances of a slip are more apparent than real.
18. I accept the Plaintiff’s evidence that at the time of the accident, there was no warning sign in the vicinity of the dropped kerb. But the lack of such a warning sign is not a contributing factor of her slip. The Plaintiff was familiar with that part of the pavement; she was aware of the wet surface of the dropped kerb, and she took care in stepping on it. There was no need for the presence of a warning sign to alert her awareness of the potential risk for slipping on the dropped kerb.
19. The Plaintiff also relies on maxim of res ipsa locquitor to support her case. That maxim applies to cases where the cause of the accident is unknown, where the Plaintiff has no access to prove the Defendant’s negligence, and where the accident is one that could not have happened without the Defendant’s negligence. In the present case, according to the Plaintiff, the cause of the accident is known; the cause of the accident is that the Defendant was negligent and was in breach of the common law as an occupier. This is also not the kind of case in which the accident could not have happened without the Defendant’s negligence. The Plaintiff could have slipped and fell because of a number of reasons without negligence on the part of the Defendant. That being the case, the maxim of res ipsa locquitor is inapplicable to this case.
20. The Plaintiff further submits that the dropped kerb was under the management and control of the Defendant. It would be the nature of the dropped kerb that would have caused the slip. In the absence of any expert opinion (if the Court so found), the accident would more likely than not be caused because of the negligence of the Defendant. If the nature of the dropped kerb is the only factor that would have caused the slip, then she must have fallen on numerous occasions prior to the date of the accident when on she walked on the dropped kerb. It is her own evidence that prior to the accident she did not avoid walking on the dropped kerb. She walked on it two to three times a week. But she did not slip. Hence I do not accept the Plaintiff’s submission in this respect.
21. In my judgment the Plaintiff has failed to prove that there was any negligence on the part of the Defendant. It has also failed to prove that the Defendant committed a breach of common law duty as an occupier. Due to the reasons stated above, I find that the Plaintiff has failed to prove that the Defendant is liable for her slip. I therefore dismiss her claim.

Costs

1. I make an order nisi, to be made absolute in 14 days’ time, that the Plaintiff do bear costs of this action, to be taxed, if not agreed, with certificate for Counsel.

( S. Chow )

District Judge

The Plaintiff : represented by Mr. Colin Wong instructed by M/S. Oldham, Li & Nie, Solicitors.

The Defendant : represented by Mr. J. Vaughan, instructed by M/S. J.S.M., Solicitors.