## DCPI 227/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 227 OF 2013

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##### BETWEEN

WONG CHAU WAN (黃秋雲) Plaintiff

and

INCORPORATED OWNERS OF NOS 11-12

CANAL ROAD WEST, HONG KONG Defendant

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Before: Deputy District Judge Kam K L Cheung in Court

Dates of Hearing: 6, 7 and 10 June 2016

Date of Judgment: 14 September 2016

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JUDGMENT

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1. This action arose out of a slip and fall accident that allegedly happened behind the main gate of the building at Nos 11-12 Canal Road West, Hong Kong (“the Building”) sometime after 11:00 pm on 27 March 2012. Broadly speaking there are two issues, namely, whether the alleged accident did happen, and, if there was indeed an accident to the plaintiff, whether the accident was due to the negligence or breach of common duty of care on the part of the defendant.

*The parties and history of proceedings*

1. The Building is an old low-rise composite building with residential units on the upper floors. It is not serviced by elevator and the entrance at Canal Road West and the common staircase provide the only means of access to the residential units on the upper floors.
2. The defendant is and was at the time of the alleged accident the incorporated owners of the Building. The plaintiff was at all relevant times the majority shareholder of Ka Wan (International) Properties Limited (“Ka Wan”), a company through which she carried on her property agency business, holding 80% of its shares. Mr Chan Ka Wai (“Mr Chan”), a friend of the plaintiff, is the other shareholder of Ka Wan holding the remaining 20% shares. At the time of the alleged accident, Ka Wan was the registered owner of a residential unit on the 4/F of the Building.

1. The plaintiff and the defendant are no stranger to each other. Ever since the plaintiff acquired the unit on 4/F of the Building in around 2009, they had been having arguments over the management of the Building and the use of a signboard said to be erected by either the plaintiff or Ka Wan on the external wall of the Building. The arguments resulted in complaints to the Buildings Authority, laying of charge against the plaintiff by the Buildings Authority and action by the defendant against Ka Wan in the Lands Tribunal. There were also heated arguments in meetings of the owners of the Building. On one occasion, Mr Chan went into fierce arguments with another owner of the building, which necessitated the calling of the police.

1. Following the commencement of the present personal injury action by the plaintiff, the defendant filed a counterclaim and claimed that the plaintiff is estopped from making any claim against the defendant because her company (ie Ka Wan) had, by committing various breaches of the deed of mutual covenants and some safety regulations, prevented the defendant from securing insurance cover for the risks that gave rise to the plaintiff’s claim. Upon application by the plaintiff and for the primary reason that that the plaintiff and Ka Wan are separate legal entitles, Deputy District Judge Winnie Tsui struck out the estoppel defence on 13 December 2014.
2. Subsequently, the defendant applied for and was granted leave by a Master to re-amend its pleadings. By its Re-Amended Defence and Counterclaim, the defendant sought a declaration that upon the lifting of the corporate veil of Ka Wan, the defendant be entitled to set off any amount that it may be ordered to pay to the plaintiff against any amount that Ka Wan may be found liable to pay to the defendant. On the plaintiff’s appeal, Judge Levy set aside the Master’s order and refused to grant leave to the defendant to amend its pleadings.

1. On 13 April 2016, the defendant discontinued its counterclaim against the plaintiff. Following the discontinuance of the defendant’s counterclaim, a large part of the defendant’s pleadings and evidence have become irrelevant. At the beginning of the trial I ordered that paragraphs 10, 11(a) of the Re-Amended Defence and the entire part under the heading “RE-AMENDED COUNTERCLAIM” be struck out. I also ordered that paragraphs 16-55 of the witness statement of Madam Fung (馮㓗英) and paragraphs 18-65 of the witness statement of Madam Au-Yeung (歐陽碧珍) be expunged.

*The plaintiff’s case*

1. The plaintiff’s case is that she was at the relevant times residing at a unit on the 4/F of the Building. On 27 March 2012 at around 11:00 pm, she wanted to go to a nearby convenience store to make some purchases. Upon reaching the bottom of the staircase and as she was pushing open the metal gate at the entrance, she noticed that there were a few passers-by on the other side of the gate. To avoid hitting them, she took a step back and pulled the gate inward. There was a puddle of water on the floor which she was not aware of. In taking a step back, she stepped on the puddle of water and slipped and fell.
2. The plaintiff claims that the defendant was negligent and/or in breach of its duties in, among others, failing to ensure that the lower part of the staircase was sufficiently lit and/or to keep the staircase in a safe condition.
3. According to the plaintiff, she was seriously injured as a result of the accident. Prolonged sick leave and medical treatments were required. At present, she is still complaining about pain and numbness in the neck, right hand and right leg, and inability to sit, stand or walk for more than 15 or 30 minutes. She is afraid of going out alone and sometimes feel anxious. She also claims that her employer (which is, in fact, her own company, namely Ka Wan) tried to arrange lighter duties to her but she was unable to cope with them. As a result, she resigned from her job in October 2013.

1. The plaintiff’s claim is well over $3 million but she has waived anything in excess of $1 million to bring her claim within the jurisdiction of the District Court. About 2/3 of the total amount claimed is represented by a claim for loss of future earnings, which amounts to $2,169,600. On the first day of the trial the plaintiff through her counsel informed the court that she would drop such claim.

*The defendant’s case*

1. Without any eye-witness of the alleged accident, which happened late at night, the defendant is inhibited from putting forward any positive case. Its defence is essentially one of a collection of non-admission and denial. At trial, Mr Sze, counsel for the defendant, submits that the plaintiff is a wholly untrustworthy witness and that the alleged accident was staged by her.

*The witnesses*

1. The plaintiff herself gave evidence at trial. For reasons not known to the court, Mr Chan, who was more than a quiet observer of the alleged accident, was not called as a witness.
2. Three witnesses were called on behalf of the defendant. They are: Madam Fung, owner of a unit on 3/F and the ex-chairperson of the defendant; Madam Au-Yeung, owner of a unit on 5/F; Madam Yuen (袁靜平), owner of a unit on 2/F who had installed a CCTV system on 2/F to have the areas outside her unit monitored.

*The evidence*

1. Apart from the plaintiff, other witnesses are unable to give direct evidence on the alleged accident. The plaintiff’s evidence is therefore the focus of attention at trial. In assessing the credibility of the plaintiff, the court takes into account, among other things, the inherent probabilities or improbabilities of her testimony, the contemporaneous documents or any evidence, which is undisputed or indisputable, tending to support or contradict one account or the other and the overall impression of the plaintiff: *Ip Fung Kuen* HCA 1897/2009 (unreported, date of judgment: 6 April 2016) at §65-67; *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* (unreported) HCA 1957/2005, 28 July 2011.

1. I have cautioned myself against the dangers of too readily drawing conclusions about the plaintiff’s truthfulness and reliability solely or mainly from her appearance or demeanour: *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 at §§36-37 (Bokhary PJ); *Esquire (Electronics) Ltd v HSBC* [2007] 3 HKLRD 439 at §135 (Stock JA).
2. Mr Chan, who was with the plaintiff all the time that evening, was not called as a witness. Not calling him though, the plaintiff has produced and heavily relied on the photos that are said to be taken by Mr Chan immediately after the accident. Among the photos produced by the plaintiff are:-
3. Photos of the lower part of the staircase taken for the purpose of showing that the lower part of the staircase and the spot where the plaintiff fell were unlit and very dark;

1. Two photos of the plaintiff sitting in darkness waiting for the ambulance;

1. A photo of the landing between G/F and 2/F taken for the apparent purpose of showing that the other parts of the staircase were better lit;

1. A photo of the upper part of the gate taken for the purpose of showing that the area behind the gate was not illuminated;

1. Photos of the ground behind the gate purportedly taken for the purpose of showing that there was water on the ground; and
2. A photo of the walls alongside the staircase taken for the specific purpose of showing that there was no warning on the walls.
3. It is obvious that the photos were not taken at random and that the photographer had one specific purpose in mind, namely, to show it to the viewers of the photos how dark the place was and what caused the plaintiff to slip and fall. Except the last-mentioned photo, all the photos were taken without flashlight. Given that one of the photos was taken with flashlight, Mr Chan must have with him a camera or phone that was equipped with flashlight. Although I can understand that he might have chosen to switch off the flashlight because he wanted to show how dark the place was, I cannot understand why he should choose to turn off the flashlight when he was trying to capture the puddle of water on the ground. It should be noted that the photos that are purportedly produced to prove the presence of a puddle of water on the ground do not quite serve their intended purpose, that is to say they do not actually show any water on the ground (at least they are not clear enough to show any water). If Mr Chan was so concerned about the absence of warning on the walls that he bothered to turn on the flashlight when taking photos, why should he not turn on the flashlight to get a better picture of water on the ground? After all, the puddle of water was the direct cause of the accident to the plaintiff. Furthermore, the ambulance did not arrive until after some 10 minutes. Had there been a puddle of water on the ground, Mr Chan had all the time he needed to take a better photo of it. In the absence of evidence from Mr Chan, the photos produced by the plaintiff raise more questions that they solve.

1. I shall add that I am with Mr Sze that the court is, in reliance on authorities like *Chan Sze Yuen v Tin Wo Engineering Co Ltd* CACV 71/2011 (25 July 2012) and *Tam Po Kei v Tam Bo Kin* [2011] 1 HKLRD 537, entitled to draw an adverse inference against the plaintiff’s case for her failure to call Mr Chan as a witness.
2. As for the lighting condition, the plaintiff’s evidence is that there was no light on either side of the metal gate at the time of the accident and that the fluorescent light on the street-facing side of the gate was installed by the defendant in early January 2014. In support of her claim that the fluorescent light was not there in March 2012, the plaintiff has drawn my attention to the minutes of meeting of the defendant held on 22 February 2014, which record a resolution that a fluorescent light be added at the top of the gate. On the other hand, it is the evidence of Madam Fung that there was always a fluorescent light on the street-facing side of the gate. The reference in the minutes of meeting to the addition of a fluorescent light is a reference to the addition of another fluorescent light on the top of the existing one.
3. I have no hesitation in rejecting the plaintiff’s evidence. It is plain and clear from the two photos respectively marked D2 and D3, which were taken by Madam Fung on 7 August 2012 during an operation undertaken by the Buildings Authority to remove an illegally erected signboard on the side of Canal Road, that there was indeed a fluorescent light at the top of the gate. As against such indisputable evidence, the plaintiff’s evidence that the fluorescent light was installed in early 2014 can have no truth in it.
4. Insofar as the area behind the gate is concerned, although I accept that the lower part of the staircase and the landing at the bottom of it were not well lit and relatively dark, there must be some light from outside and the top of the staircase. I do not accept that walking down the staircase was like walking in darkness and prefer Madam Fung’s evidence that the staircase was not so dark that it was unsafe to walk on it.
5. I now turn to another piece of important evidence, namely, the CCTV footage.
6. The entrance of the Building and parts of the staircase were monitored by CCTV. Although the alleged accident happened in a blind spot, the CCTV footage does provide some useful insight into what happened on that particular evening. The CCTV footage shows:-

Plaintiff walking up

22:28:52 The plaintiff entered the Building with Mr Chan.

22:33:28 The plaintiff and Mr Chan reached 2/F.

22:33:38 The plaintiff and Mr Chan walked past the landing between 2/F & 3/F.

Plaintiff walking down after a brief visit to the upper floor

22:38:26 The plaintiff and Mr Chan reached the landing between 2/F & 3/F from the upper floor.

22:38:34 The plaintiff and Mr Chan reached 2/F.

22:41:48 The plaintiff reached the ground floor.

22:51:20 The ambulancemen arrived.

1. As shown in the CCTV footage, the plaintiff and Mr Chan were walking at a good pace. It took them a couple of seconds to walk up from the 2/F to the landing between 2/F and 3/F. Strangely, it took them some 4 minutes and a half to walk from G/F to 2/F and some 3 minutes from 2/F to G/F. The question is: Why it took them so long to walk up to 2/F and down from 2/F to G/F? The plaintiff’s evidence is that when they walked up, they spent some time reading the notices on the notice board. When asked whether there was anything in the notices that caught her attention, she said there was nothing remarkable. As to why it took them more than 3 minutes to walk from the 2/F to G/F, the plaintiff was unable to offer any satisfactory explanation. All that she said was that she might have stopped to read the notices again.
2. I do not find the plaintiff’s explanation satisfactory because I consider it implausible that she needed to stop to read what she had just read less than 10 minutes ago. As she said, there was nothing remarkable in the notices. In my view, she is determined not to tell the court what she and Mr Chan did in the 3 minutes.
3. I also disbelieve the plaintiff on other issues. Insofar as her injury and alleged residual disability is concerned, she claims that she was seriously injured and still feels debilitated. However, her claim that she has pain in many parts of her body and is unable to bend forward, sit, stand or walk for more than 15 or 30 minutes is inconsistent with the medical and surveillance evidence. I shall deal with the medical evidence first. It should be noted that there is no medical finding of anything particularly serious. In the A&E report, it is noted that the plaintiff complained about pain and numbness in the head, neck right elbow, right hip and right knee. However, the doctor at the Accident and Emergency Department, after examining her and carrying out X-ray of the skull, cervical spine, right elbow, right knee and the pelvis, could find nothing remarkable. The plaintiff was discharged without hospitalization. All that she was prescribed was a few pain-killers and analgesic balm.
4. I shall add that the plaintiff actually refused to stay in hospital for observation (given her complaints, the doctor advised her to remain in hospital for further observation). Her case is that she needed to go home as soon as possible to attend to a child. However, as revealed in cross-examination, the so-called child was actually her 20-year-old daughter who was attending university. I do not accept her evidence that she discharged herself from hospital because she needed to attend to her daughter. The truth is more likely to be that she did not want to spend more time at hospital because she was not bothered by the alleged or any injury.
5. In the joint medical report of Dr Johnson Lam (instructed by the plaintiff) and Dr Li Wing Kin (instructed by the defendant), Dr Lam, referring to the MRI of the spine notes that the plaintiff’s complaint of pain in the neck is consistent with the condition of the spine. However, Dr Lam accepts that the injury to the plaintiff was no more than soft tissue injury. He also accepts that the plaintiff should be able to cope with normal daily duties. On the other hand, Dr Li notes that he is unable to identify any underlying pathology for the various complaints of the plaintiff and that she has magnified her symptoms.
6. I find Dr Li’s opinion more convincing. Not only is it more consistent with the objective medical findings, it is consistent with the surveillance evidence. On 25 March 2015, 18 May 2015 and 29 May 2015, the plaintiff was followed by a private investigator and observed to be able to walk up a slope, walk down a staircase at a good pace without holding the handrail, run across a road, board a bus and proceed to the upper deck, walk along the aisle of a bus while browsing her cell phone and attend a gathering at a Chinese restaurant. In the gathering at the restaurant, the plaintiff was busy serving others tea, talking to the waitresses, shaking hands and greeting people. I am mindful that surveillance evidence has it limitation: the subject does not go out on a bad day to be followed and videotaped. However, the dichotomy between the plaintiff’s complaints and the surveillance evidence is so great that the only conclusion is that the plaintiff has grossly if not dishonestly exaggerated her problems.
7. I also find that the plaintiff is less than truthful in her evidence as to what the alleged accident has cost her. The plaintiff was the proprietor of a property agency business and her own boss. Leaving aside whether she has suffered any significant residual disability, it is an abuse of the language to say that she had to resign from her job because she was unable to cope with the lighter duties that her employer had kindly agreed to assign to her. Furthermore, despite the fact that the plaintiff should have in her possession her and Ka Wan’s financial documents, it remains a mystery how much she was earning at the time of the accident. It is pleaded that she used to earn $42,600 per month. In support of her pleaded case, she has produced a note issued by Ka Wan and her employment contract with it. Ka Wan being her own company, the note and the contract are self-serving and of no use to the court. The documents that she has disclosed do not lend any support to her claim that she was earning $42,600 a month at the time of the accident. Interestingly, one of the duplicate demand notes issued by the Inland Revenue Department shows that she paid $558,000 in tax for the profits that she had earned in 2011-2012. Obviously, she was earning much more than $42,600 a month. It is anyone’s guess why she chose to understate her actual income but I have no doubt that she is not forthcoming when called upon to tell the court how much she actually earned.

*Conclusion on liability*

1. All in all, it is my view that the plaintiff is not a truthful witness. I am not satisfied that there was an accident to her as alleged. The plaintiff’s claim is dismissed.

*Other matters*

1. Before I put a full stop on the liability issue I feel obliged to deal with a few points raised by Mr Shum, counsel for the plaintiff.

1. First, Mr Shum has cited quite a number of authorities to me and argued that the defendant, which was in occupational control of the common parts of the Building and being the incorporated owners of the Building, was under a duty to keep and maintain the common parts in a safe condition. Having dismissed the plaintiff’s claim on factual grounds, there is no need for me to give any detailed account of the legal duties of the occupier/manager of the common parts of a building. Suffices it to say that I do not take issue with the proposition that the defendant being the incorporated owners and occupier of the common parts of the Building was under a duty to keep and maintain the staircase in a safe condition.
2. Dozens of photos have been produced to show that the common parts of the Building were not managed properly. It might well be that the defendant had neglected its duties in maintaining and managing the common parts of the Building. However, given my finding that the plaintiff has failed to prove the alleged accident, it does not matter how badly the defendant managed the common parts of the Building.
3. Further, Mr Shum, relying on cases like *In the Matter of Colorado Products Pty Ltd (in provisional liquidation)* [2014] NSWSC 789, *HKSAR v Subramaniam Navarajan* CACC 480/2006 and *Ho Sing Yin v Chan Yiu Ling* HCA 90/2010, urges me to completely disregard the evidence of the defendant’s witnesses on the ground that their respective witness statement is a copy and paste version of each other. While I can understand why one may raise his eyebrows if two police officers, who both claim to have made independent observation of the very same event, give evidence that is completely identical in terms, I find nothing objectionable in the present case that certain parts of the witness statements of the defendant’s witnesses are identical in terms. After all, the identical parts of the witness statements relate to matters that are not seriously in dispute. The present case is clearly distinguishable from the cases cited by Mr Shum. In any event, I do not have to rely on the parts that are identical in terms to come to the same conclusion that the plaintiff is not a truthful witness.
4. Mr Shum has also raised an interesting argument. He submits that the defendant has through counsel conceded in the defendant’s opening submission that the plaintiff was earning $36,000 a month. To be fair to counsel, I shall set out the relevant part of the defendant’s counsel’s written opening.

“24. The joint experts were told by P that she was paid a fixed salary of $36,000 per month prior to the accident.

25. Dr Li Wang Kin who examined P opined that a justifiable period of sick leave should be from 28 March 2012 to 15 September 2012, ie 172 days.

26. It is submitted that the appropriate award uner this head should be $36,000 x 172/30 x 1.05 = $216,720.”

1. Relying on the above-quoted passages, Mr Shum submits that the plaintiff is at the very least entitled to an award of $216,720 for pre-trial loss of earnings.
2. A binding concession must be clear and unequivocal. With respect to Mr Shum, I am afraid that there is not any clear and equivocal concession. After all, why should the plaintiff be entitled to claim the benefit of a reference in the defendant’s counsel’s opening to the figure $36,000 if her case is that she was earning $42,600? Furthermore, it should be noted that it is pleaded in the defendant’s Answer to Revised Statement of Damages that “*… subject to proof of the Plaintiff’s monthly salary, an appropriate award should be HK$36,000 x (172/30) x 1.05 = HK$216,720*”. Objectively, I have no doubt that Mr Sze is simply arguing that the plaintiff can *at best* ask for an award based on the figure of $36,000.

*Quantum*

1. For completeness sake and in case I am wrong on my judgment on liability, I shall deal with quantum briefly.

*Damages for pain, suffering and loss of amenities*

1. It is plain that there was nothing but soft tissue injury to the plaintiff. Relying on cases like *Fazal Ahmed v MTR Corporation Limited* DCPI 29/2011, *Lo Yin Fong v Maxim’s Caterers Ltd* DCPI 1424/2009 and *Tam Fu Yip v Sincere Engineering & Trading Co Ltd* HCPI 473/2006, I allow $50,000 under this head.

*Pre-trial loss of earnings*

1. I prefer Dr Li’s evidence that the appropriate period of sick leave should be 172 days.
2. Having decided on the length of sick leave, it remains necessary for me to decide on the multiplicand. The plaintiff having refused to tell the court how much she was earning at the time of the accident, I am inhibited from deciding on the multiplicand and have no choice but to conclude that the multiplicand is, on the evidence, zero. 172 times zero is zero. No award is made under this head.

*Future loss of earning*

1. The claim was abandoned at the beginning of the trial.

*Loss of earning capacity*

1. There being no evidence that the plaintiff has suffered any marginally significant residual disability, the claim under this head is bound to be dismissed.

*Medical expenses*

1. Although the plaintiff did attend to various private practitioners, a chiropractor and Chinese medicine practitioner, I am not satisfied that all of the treatments/consultations were reasonable or necessary. Doing the best I can, I assess the award under this head at $5,000.

*Travelling expenses*

1. I agree with the defendant’s counsel that the appropriate award should be $1,000 and accordingly award $1,000.

*Tonic food*

1. There being no evidence that the plaintiff needed or would be benefited from any tonic food, the claim under this head is dismissed.

*Interest*

1. There will be interest on (a) damages for PSLA at 2% per annum from the date of the writ of summons and (b) special damages at 4% per annum from the date of the accident. I shall leave it to parties’ legal teams to work out the amount of interest recoverable.

*Disposal of the action*

1. I make the following orders:-

(1) The plaintiff’s action be dismissed with costs to the defendant with certificate for counsel; and

(2) The above costs order being a costs order *nisi* will become absolute in the absence of application for variation within 14 days.

1. Lastly, I thank counsel for their assistance.

( Kam K L Cheung )

Deputy District Judge

Mr Erik Shum, instructed by Cheung & Liu, for the plaintiff

Mr Jeffrey Sze, instructed by Eric Yu & Co, for the defendant