DCPI 248/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 248 OF 2005

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BETWEEN

CHAN CHING YUK Plaintiff

and

OTIS ELEVATOR COMPANY (H.K.) LIMITED 1st Defendant

THE SECRETARY FOR JUSTICE 2nd Defendant

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Coram: His Hon. Judge Leung in Court

Date of hearing: 3-5; 9 July 2007

Date of handing down judgment: 11 September 2007

**JUDGMENT**

**INTRODUCTION**

1. This action arose out of an accident happened on an escalator at a government municipal service building in Hong Kong in 2002. She commenced action against the 1st Defendant, being the contractor responsible for the maintenance of the escalator, and the Food and Environmental Hygiene Department (**“the FEHD”**), being the department in charge of the building, and hence the 2nd Defendant on its behalf.

**BACKGROUND**

1. The escalator in question is one of the two inside the Shek Tong Tsui Municipal Services Building in Western District, Hong Kong (**“the Building”**) linking the street level entrance and the mezzanine floor, which is an indoor market. It is an ascending escalator (**“the Escalator”**) and separated from the other descending escalator by a flight of stairs in the middle for visitors who choose to walk.
2. At about 9:00 am on 16 March 2002, the 62-year-old Plaintiff and her friend, Madam Choi Choi Kam (**“Choi”**), were on their way into the Building. When the Plaintiff was on the Escalator, she fell down onto the lower landing of the Escalator and was injured.
3. The pleaded causes of action against the Defendants were breach of statutory duty and/or negligence and/or breach of common duty of care as occupier on the part of the 1st and/or the 2nd Defendant. As the contractor responsible for the maintenance of the Escalator, the 1st Defendant did not seem to have the necessary degree of control over the Escalator so as to attract such common duty as occupier on its part. Except for this, there was no real dispute over the existence of the duties on the Defendants.

**THE ISSUES**

1. The issues are as follows:
   1. How the accident happened.
   2. Whether the Defendants were in breach, and for proving this, whether the maxim of *res ipsa loquitur* applied.
   3. If the Defendants were liable, how liability should be apportioned.
   4. Whether the Plaintiff was guilty of contributory negligence.
   5. Quantum of damages.

**HOW THE ACCIDENT HAPPENED**

**The Plaintiff’s case**

1. When Mr. Gidwani opened the Plaintiff’s case, he confirmed that this was not a slip-and-fall case though the slippery condition of the Escalator was suggested in the pleading. The only issue was the functioning of the Escalator at the material time.
2. According to the pleading, the Plaintiff’s case was clearly that the Escalator suddenly stopped. When it suddenly moved again, the Plaintiff lost balance and fell. The Plaintiff also gave this account in her 1st statement filed in 2002. She apparently gave the same account to the medical experts which was recorded in their joint report in 2006.
3. By her latest statement (filed in 2007 not long before the trial), the Plaintiff said she only sensed but did not really see the Escalator stop. The Plaintiff had second thought about this probably due to what the Defendants’ witnesses said in their statements filed by then. I would refer to their evidence in due course.
4. Mr. Gidwani for the Plaintiff based his written opening submissions on the alleged sudden stoppage and movement again of the Escalator. However, when he came to make his oral submissions (and in his closing), he suggested that it would be sufficient for the Plaintiff to establish a sudden jerk of the Escalator. I do not see that a sudden jerk carries the same meaning and effect of a sudden stoppage and movement again. Since the claim is based on how the Escalator was functioning at the material time, the difference is in my judgment neither microscopic nor included by the tenor of the Plaintiff’s pleading as submitted.
5. The Defendants would also need to know precisely the case to answer. They had indeed prepared their respective cases on the basis of the Plaintiff’s pleaded case.
6. In any event, it became clear during trial that the Plaintiff (and her witness) stuck to the pleaded case of sudden stoppage and movement again of the Escalator. In court, the Plaintiff did not say the Escalator jerked. On the contrary, both she and Choi said that the Escalator stopped and moved again. In the circumstances, I do not have the evidential basis to find that the Escalator merely jerked, as suggested by Mr. Gidwani, assuming that I have the power to do so even in the absence of pleading. At the end of the day, the sudden jerk of the Escalator remained nothing more than a suggestion during trial by Mr. Gidwani.

**The evidence**

1. According to the Plaintiff’s 1st statement, when the Escalator rose by 2 to 3 steps, it suddenly stopped. She immediately grabbed the handrail but the Escalator suddenly moved again. She therefore lost balance and fell.
2. In her latest statement, the Plaintiff stated that when she sensed the Escalator stopped, she intended to grab the handrail and to step up along the Escalator. The Escalator suddenly started to ascend again and thus causing her to lose balance and fall.
3. In court, the Plaintiff said she already held the handrail after setting foot on the Escalator. She walked up for 2 to 3 steps then felt the Escalator stopped. She raised her foot intending to walk up but the Escalator suddenly moved again. She fell.
4. Mr. Gidwani for the Plaintiff submitted that the difference among these versions of the Plaintiff’s evidence was minute and excusable. However, the starting point is that the Escalator was at the time a moving conveyance. How the Plaintiff positioned herself and moved along it as well as whether she held the handrail at all times was not only relevant to why she fell but also to the issue of contributory negligence. I have to be sure though on the balance of probabilities. But I do have reservation in relying on what the Plaintiff said.
5. Choi was called as an eyewitness of the accident. She was no better. She said she saw the Escalator stopped. The fact that Choi was an eyewitness, seemingly the only eyewitness, of the accident was not recorded in any contemporaneous documents including the reports of the staff of the FEHD. She explained that she had intended not to say too much, but was nevertheless called as the Plaintiff’s witness now.
6. Several aspects of Choi’s evidence raised doubt as to her reliability. In her statement, she stated that she was occupied with taking money from her purse for buying charity flag near the lower landing of the Escalator. The Plaintiff went ahead of her to the Escalator. But in court, she said when the Plaintiff fell, she was only a couple of feet behind her. The Plaintiff should be falling backwards towards her but somehow managed to avoid bumping into her. She said she saw the Plaintiff hold the handrail but could not tell by which hand the Plaintiff did. She also said the Plaintiff stood still on the Escalator but this contradicted the Plaintiff’s evidence.
7. According to her statement, there was no warning sign in the vicinity of the Escalator. This is clearly contradicted by the photographs of the Escalator taken on the day of the accident. Numerous warning signs were affixed on the conspicuous parts of the Escalator advising users on the steps and care to take when using the Escalator. Being someone who made frequent visits to the Building, Choi obviously had not paid attention to the surrounding.
8. I could not attach much weight to Choi’s evidence.

**The Defendant’s case**

1. Before the evidence of the Defendant’s witnesses was received in court, objection was raised by the Plaintiff against the inclusion of what was tantamount to expert opinion in the Defendants’ witness statements. Late as the objection might be, it was somehow justified. In fact, parties had previously consented to the direction that no expert evidence on liability should be allowed.
2. Counsel resolved the dispute largely by consent so that specific paragraphs and sentences of the various statements were deleted. I allowed the remainder of the statements to stand but to the extent that they contained the witnesses’ own perception of the facts. I do not take any of their evidence as expert opinion.
3. The 1st Defendant was the supplier and contractor responsible for the maintenance of the Escalator. Its witnesses explained that the design and the operation of the Escalator did not permit it to move again after stoppage for whatever reason (such as the trigger of the emergency stoppage device). The Escalator would have to be manually restarted by a special key inserted from the outside. Sudden moving after stoppage was never heard of. They also explained that when the Escalator was stopping for whatever reason, it could not come to an abrupt halt. There was a stopping distance over which the Escalator would decelerate before coming to a complete halt. Such stopping distance had to fall within the statutorily prescribed parameters.
4. The key issue was not how the Escalator should function but whether it was functioning properly as it should be at the material time.
5. In this regard, the technicians and engineer of the 1st Defendant, who attended the scene shortly after the accident, explained their post-accident examination and test. They were conducted in accordance with the statutorily prescribed standards. They detected nothing abnormal. No repair or adjustment was required. In particular, the stoppage and braking devices were found to be functioning properly. The stopping distance upon emergency stoppage was proved to be within the prescribed parameters. The results were also contained in the examination report of that day. The Escalator was checked again the following day and was reopened.
6. The inference is that nothing about the Escalator mechanically was found which might have caused the Escalator to suddenly stop. In view of the proper functioning of the safety device, the inference is also that had the Escalator for whatever reason stopped, it should have decelerated within the prescribed stopping distance before coming to a halt. The Escalator also could not have restarted except manually.
7. Mr. Gidwani tested by cross-examination various possible causes for malfunctioning of the Escalator at the time or, as he tried to establish, a sudden jerk. However, the impact of wetness (on the day being a wet day) was ruled out in the absence of actual flood. The alleged unintentional reverse of the Escalator was suggested as a possibility but not made out as a matter of (probable) fact. Even in that event, the safety stopping distance would have come into play.

**Conclusion**

1. No doubt the fact remained that the Plaintiff fell from the Escalator. But that could be explained even when the Escalator was functioning properly. Instances such as failure to stand still or to hold the handrail might explain. According to the video recording of the operation of the Escalator some time after the accident, I notice a rather common but alarming feature. Rarely were the users of the Escalator seen holding the handrail properly or at all.
2. Considering all the evidence, including those specifically analysed above, I am not satisfied that the Escalator in fact suddenly stopped and moved again at the material time as alleged.
3. In so far as this action is concerned, the Plaintiff’s failure to prove that the accident was in fact connected with the alleged malfunctioning of the Escalator (though she did not need to prove why and what malfunction) would be the end of her case.
4. I proceed to consider the other issues in the event I am wrong above.

**WHETHER THE DEFENDANTS WERE IN BREACH**

***Res ipsa loquitur***

1. The nature of the maxim as an evidential rule should not be in real dispute: see, for instance, *Sandfield Building Contractors Ltd v Li Kai Cheong* [2003] 3 HKLRD 48, 50J-51I; *Mok Ka Yin v Tsang Hing On & Anor*, DCPI 692/2004, 12 June 2007, paras.14, 16-19.
2. Assuming that the Escalator at the time suddenly stopped and moved again as alleged or jerked as suggested during trial, does the evidential rule of *res ipsa loquitur* avail the Plaintiff so that the Defendants were liable unless they displaced the inference of negligence?
3. In *Kam Wai Ming v MTR Corporation Ltd & Anor*, unrep. DCPI 408/2002, 11 December 2003 (which counsel for the Defendants relied on), the plaintiff fell from an escalator inside a MTR station upon the sudden stoppage of the escalator. After much consideration, the court was unable to say, on a preponderance of probability, why the escalator stopped. It was submitted on behalf of the plaintiff that whatever caused this to happen must have been caused by the defendants’ negligence, relying on *res ipsa loquitur*.
4. The learned Judge cited the Canadian case of *Naicken v Edmonton City* [1997] AR Lexis 1507; 197 AR 331 with approval. I may perhaps borrow the statements of the principle (in the context of accident on an escalator) summarised by Langston J in *Naicken*:

“The doctrine applies where the incident speaks of negligence and that negligence attaches to the defendant. No inference of negligence on the part of an operator of an escalator can be drawn from the fact alone that one is a passenger on such a device when an injury is suffered. To suggest otherwise would be tantamount to making the operator an insurer which is too high a standard of care. The plaintiff must show that an inference can be drawn from common experience or the facts disclosed, that reasonable care was not taken based on the incident which gave rise to the injury, not from the injury itself. **In this case the injury suffered by the plaintiff is not the basis for invoking ‘res ipsa loquitur’, rather it is the functioning of the escalator and more specifically the manner in which the device stopped**.”

(emphasis added)

1. In *Kam Wai Ming*, the learned Judge was able to apply the analysis in *Naicken* because the factual circumstances of both cases were indeed similar. In both cases, the escalator in question stopped suddenly. That fact alone could not give rise to the inference of abnormal functioning of the escalator. As stated by Langston J in *Naicken*:

“……**escalators are designed to stop and stop quickly in certain circumstances** and that is one of the risks users must assume for the conveyance and utility of the ride. The issue in this case is the speed with which the device stopped……”

(emphasis added)

In *Kam Wai Ming*, the learned Judge held (at para.59):

“……*Res ipsa loquitur* cannot run to avail the Plaintiff, really for the reasons given by Langston J, *supra*, and particularly **in the case of this escalator, which is designed to stop in given particular circumstances. The fact that it stopped unexpectedly cannot give rise to the inference that it did so by virtue of negligence** on the part of any of the Defendants.”

(emphasis added)

1. However, the allegation in the present case (assuming that it was true) is that the Escalator suddenly stopped and then moved again or alternatively, jerked. This was not merely sudden stoppage. This was not how the Escalator was designed to function.
2. In these circumstances, I believe the Plaintiff could have relied on the maxim to infer negligence on the basis of an apparent abnormal functioning of the Escalator unless the Defendants adduce evidence of reasonable care having been taken to ensure its proper functioning.

**Whether the Defendants have exercised reasonable care**

1. The following citation of the Canadian case of *Empire Company Limited v Sheppard* 103 ACWS (3d) 436 by the learned Judge in *Kam Wai Ming* is helpful in this regard:

“……an escalator is machinery with a high potential for injury and damage, if it is not: (i) operated and maintained with a high standard of care, and (ii) used with care, caution and alert attention. **Clearly, the owner or operator has responsibility to meet the first requirement and the users have responsibility for the second.** Addressing the first issue will involve consideration of only the first of those two requirements: **what is reasonably required of an occupier who operates and maintains an escalator to be used by visitors to the occupier’s premises.**”

(emphasis added)

In *Naicken*, the court also said:

“To succeed the plaintiff must establish that reasonable care was not exercised in relation to the operation or maintenance of this escalator, which caused it to stop abruptly and thus demonstrated that **it failed to meet the accepted standards for such a device or if those standards were met, those standards adequately addressed the potential risk faced by users of the device**. The plaintiff must establish on the balance of probabilities that the evidence supports a finding of negligence on the part of the defendants. In the alternative the facts, as I find them, must allow me to draw an inference that negligence is made out by the circumstances which surround the happening of the event.”

(emphasis added)

The 1st Defendant

1. The Escalator was installed by the 1st Defendant in about 1991.
2. I mentioned above the examination and testing of the Escalator carried out by the technicians and engineer of the 1st Defendant. As the contractor responsible for the maintenance of the Escalator, the 1st Defendant had to follow stringent requirements both under the law and pursuant to the contract with the Government.
3. The starting point was the *Lifts and Escalators (Safety) Ordinance,* Cap.327 (**“Cap.327”**). Cap.327 prescribes the requirements and the making of a code of practice for the design, construction and servicing of such devices. The standards adopted are actually in line with the British Standard. The 1st Defendant provided regular weekly maintenance, which was recorded in the 1st Defendant’s maintenance record as well as the maintenance logbook required by the Electrical and Mechanical Services Department (**“the EMSD”**). Periodic examination of the equipment every half a year and testing of the safety devices yearly had to be certified by the registered engineer of the 1st Defendant in accordance with the prescribed form under Cap.327. These are the certificates which are required to be affixed on the escalators or inside the lifts in the private properties.
4. In the present case, both the half-yearly and the yearly examination and testing respectively were carried out at the same time and the Escalator and the safety devices were officially certified to be in a proper working order in November 2001, less than 4 months prior to the accident. The regular maintenance on 12 March 2002, i.e., 4 days prior to the accident, revealed no irregularity.
5. There was no evidence of questionable quality of the maintenance and testing. There was no evidence to suggest that the technicians were not competent or that such maintenance was carried out negligently. Quite on the contrary, the technicians and engineer involved possess many years of relevant experience. As can be seen from the maintenance records, regular maintenance took a number of hours, suggesting that this was not a hasty job.
6. The post-accident examination and testing shortly after the accident on the same day revealed that the Escalator was normal without indication of any mechanical defect which might cause the Escalator to stop suddenly in the first place as alleged or to move with jerk as suggested.
7. The maintenance records subsequent to the accident contained references to a couple of accidents involving users falling from escalators. However the corresponding accident reports explained that these accidents had nothing to do with the mechanical function of the escalator but rather the failure of the users (aged 61 and 85 respectively) to maintain balance. The stable and smooth running of the Escalator at the time of those incidents was confirmed. There was also record of one occasion of sudden stoppage of the Escalator but no details were recorded.

The Government

1. As mentioned at the outset, the FEHD was the occupier of the Escalator and therefore under the common duty of care to its users: see section 3(3) of the *Occupiers’ Liability Ordinance*, Cap.314 (**“Cap.314”**). Such duty should practically coincide with the department’s general duty not to be negligent.
2. In determining whether the Government has discharged its duty, regard is to be had to all the circumstances including where damage is caused due to the faulty execution of any work of construction, maintenance or repair by an independent contractor, it is not to be treated without more as answerable for the danger if in all the circumstances it had acted reasonably in entrusting the work to an independent contractor and had taken such steps as it reasonably ought in order to satisfy itself that the contractor was competent and that the work had been properly done: see section 3(4)(b) of Cap.314.
3. There was evidence of the tender procedure and the selection of the 1st Defendant from the Government’s list of specialist contractors. The choice of the 1st Defendant being a competent contractor was not really in dispute. The question is whether the Government had taken such steps as it reasonably ought in order to ensure that the 1st Defendant had provide proper maintenance and servicing to the Escalator. As mentioned above, such supervision was a joint departmental task involving the FEHD and the EMSD.
4. To begin with, the maintenance contract between the Government and the 1st Defendant governed the contractual responsibilities of the 1st Defendant. During trial, there was no suggestion that the contract was deficient in specifying the obligations of the 1st Defendant.
5. In so far as supervision of the 1st Defendant’s maintenance work is concerned, it was mentioned above that the regular maintenance record had to be kept in the logbook of the EMSD. The EMSD would send supervisors to conduct random inspection of the equipment and devices including the Escalator at least once a month. There was no evidence of matters suggesting improper execution of the maintenance work or failure of the EMSD in the inspection.
6. In so far as the management of the Building including the Escalator is concerned, the FEHD’s inspecting officers on site would conduct a 2-time daily patrol to numerous specific areas inside the Building. One of the specific areas covered the escalators. Irregularities including cleanliness or damage or malfunction would be recorded and reported for necessary action. Further, numerous warning signs had been posted at the conspicuous parts of the escalators reminding the users of the care to be taken when using them. There was no evidence suggesting that the system in place contained loopholes which permitted accident to happen due to malfunctioning of the Escalator.

**Conclusion**

1. In the circumstances, even if the accident happened as a result of the sudden stoppage and movement again as alleged or the sudden jerk as suggested by Mr. Gidwani, the same was apparently an isolated incident, the occurrence of which could not be attributed to any breach of duty on the part of the Defendants in the management or maintenance of the Escalator.
2. Mr. Gidwani submitted that since nothing is impossible, the Defendants should have had in place a protocol on examining jerks in the movement of the Escalator. In my judgment, the law expects reasonableness rather than insurance in the discharge of the Defendants’ duty. In the absence of sufficient evidence to substantiate an appreciable risk or to put the Defendants on enquiry of the possibility of such alleged jerk in the Escalator’s movement, the Defendants should not be to blame for not taking precaution against that.

**Apportionment**

1. The Defendants had issued notice of contribution or indemnity against each other. Besides common law indemnity, the 2nd Defendant claims for contractual indemnity against the 1st Defendant pursuant to clause 24(1) of the maintenance contract. The apportionment of the Defendants’ liability in accordance with their respective blame for the purpose of common law indemnity is preserved: see clause 24(2). However, this would not include the Government’s negligence or omission in ensuring and supervising proper performance of the 1st Defendant’s work: see clause 24(3).
2. If the Government were liable to the Plaintiff for failing its duty of supervision of the 1st Defendant’s performance of the contract, *and nothing else*, the 2nd Defendant should still be able to seek full indemnity from the 1st Defendant against such liability to the Plaintiff.
3. In view of my findings above, there is no need to say more on this issue.

**CONTRIBUTORY NEGLIGENCE**

1. The second question posted in the judgment of *Empire Company Limited*, which the learned Judge in *Kam Wai Ming* cited with approval, related to whether the users of escalators use the same with care, caution and alert attention.
2. The learned Judge in *Kam Wai Ming* referred to the following paragraph in the judgment of *Naicken*:

“There are inherent risks in using conveyances such as escalators and elevators and this fact is apparent from the very nature of the devices and from the fact that certain warnings are posted cautioning users to exercise care when entering or using such devices. I have already referred to the warnings which were posted on this escalator. The fact that the plaintiff was a frequent user of this and other escalators no doubt reinforced her feeling of security in such case, a feeling undoubtedly shared by the general public. Considering the high standard of care imposed upon owners of such devices and society’s common experience with such devices, it is clear that the social utility of these conveyances exceeds the risks run in their user.

However, escalators are designed to stop and stop quickly in certain circumstances and this is one of the risks users must assume for the conveyance and utility of the ride……”

The learned Judge in *Kam Wai Ming* had the same analysis (at paras.56-57):

“Mr Ismail has submitted that even if I cannot say precisely why the escalator stopped, that does not matter. Escalators are designed to stop in an emergency and passengers are taken to appreciate this and should keep hold of the handrail for that purpose, as the many notices on this escalator remind them.

In my view, this must be right. This escalator had been travelling at an appropriate speed, it stopped within the accepted EMSD parameters, and to hold either the Defendant guilty of negligence or in any of the other ways alleged against them would be to elevate them to the status of an insurer. An escalator is designed to stop in emergency, or at all events, at an unpredictable moment, and with that in mind, a passenger is expected to take the simple precaution of holding the handrail. The Canadian cases which I have cited show this to be the correct analysis of the situation. This was an escalator in good working order and working as contemplated by the ESMD guidelines.”

1. Users must not only assume the risk of escalators stopping quickly for one reason or the other, but must also assume that the risk of losing balance notwithstanding the safety device preventing the escalators from coming to an abrupt halt. This explains why the operators of escalators and the Government must still warn the users to stand still, to hold the handrail tightly as well as to take care *at all times* when using the escalators via various mass media.
2. Had the Plaintiff held the handrail tightly and stood still at all times once setting foot on the Escalator, the accident would not have happened even if it stopped suddenly or jerked.
3. In fact, the Plaintiff referred to her experience of hearing the broadcast of such safety precautions when she used the escalators in the MTR station. She admitted knowledge about the warning signs on the Escalator too. In the circumstances of this case, the Plaintiff’s failure to hold and handrail and to stand still once setting foot on the Escalator went beyond mere carelessness.
4. Mr. Chan for the 1st Defendant submitted that the Plaintiff should be 75% responsible for the accident. Mr. Wong for the 2nd Defendant submitted contributory negligence should at least be 50%, referring to a couple of cases of slip and fall.
5. In my view, the Plaintiff should be half to blame for the above reason even assuming that either of the Defendants was liable as alleged.

**QUANTUM**

1. Also for completeness, I proceed to consider the quantum of damages.

**Injuries and treatment**

1. The Plaintiff was admitted to the Government hospital immediately after the accident. She was diagnosed to have suffered a Colles’ fracture of the left wrist. She discharged herself in preference of admission to a private hospital on the same day. The fracture was immobilised by a short arm cast. She was discharged 2 days later. Thereafter, she attended regular private medical follow-up treatment and physiotherapy.

**Medical expert opinion**

1. The Plaintiff was examined by Dr. K K Au (engaged on her behalf) and Dr. P C Lee (engaged on behalf of the 1st Defendant) on 17 March 2006. They prepared their joint medical report dated 27 March 2006 which was adduced as evidence as directed by the court.
2. The experts confirmed that the fracture healed solidly with residual deformity and pain and stiffness. The Plaintiff also had shoulder pain and stiffness due to frozen shoulder.
3. Dr. Au opined that the left shoulder pain was complication of the wrist injury. Dr. Lee basically agreed but added that 98% of the persons with frozen shoulder resolved spontaneously. He opined that the stiffness and weakness of the shoulder was more due to the weakness of the left side of her body due to her heart condition rather than the frozen shoulder.
4. Regarding her heart condition, the experts were informed that the Plaintiff had a coronary bypass and valvular replacement operation in December 2003. She was left in a coma for a period of time after the operation. After recovery of consciousness, she noticed weakness of the left side of her body. In the circumstances, the experts agreed that the Plaintiff’s left side weakness and impaired ambulation ability was not attributable to the accident.
5. The experts agreed that the treatment given to the Plaintiff was both appropriate and adequate. She has achieved maximum medical improvement and no further treatment was recommended.
6. According to the report of Dr. C K Chan (in May 2002) as well as Dr. Au (in January 2003) prior to her heart condition and operation, the Plaintiff’s prognosis was good and she was considered to be able to recover in 6 months’ time. She could also perform all the self-care and hygiene activities, e.g., bathing, grooming, eating, dressing and toileting. Her right hand function is normal and she could write. She could hold a bowl with her left hand too.
7. The difference in the assessment by Dr. Au and Dr. Lee was not substantial. This is partly reflected by their assessment of the Plaintiff’s permanent impairment of the whole person: Dr. Au assessed that to be 6% whereas Dr. Lee assessed that to be 5%.

**Pain, suffering and loss of amenities (PSLA)**

1. At the time of the accident, the Plaintiff was a 62-year-old housewife.
2. The Plaintiff claims HK$300,000 for the Plaintiff’s PSLA. Of the cases cited by Mr. Gidwani for the Plaintiff, the closer comparables are *Sin Sau Mui v Yuen Sai Kwong & Ors*, unrep., HCA 11319/1993, 6 November 1996 and *Yuen Wai Kuen v Chan Shan*, HCPI 957/1996, 1 December 1998.
3. The Defendants submitted HK$200,000 (HK$50,000 more than the pleaded amount). Reliance was placed on cases including *Sin Sau Mui* (above); *Lau Kwai Kwong v Yiu Wing Construction Co Ltd & Anor*, unrep., HCPI 269/2004, 25 April 2005; *Tsang Hin Cheung v Ng Kit Yeung & Anor*, unrep., HCPI 956/2003, 3 January 2005.
4. Considering the Plaintiff’s age, the injury to her non-preferred hand, the treatment received and the degree of impairment attributable to the accident (and not her heart condition and surgery), I find that HK$200,000 would have been a fair award for her PSLA.

**Miscellaneous special damages**

Hospital, medical and travelling expenses

1. The hospital, medical and travelling expenses were agreed.

Tonic food

1. An amount of HK$20,000 was claimed. In the absence of proper evidence of these expenses, I would have allowed HK$5,000.

Future medical expenses

1. The Plaintiff claims HK$10,000 for future physiotherapy. In view of the opinion of the medical experts mentioned above, I have insufficient basis to find that future treatment would achieve any further improvement. I would not have allowed this item of claim.

Cost of domestic help

1. The Plaintiff claims that she needs part time domestic help with her daily activities. This happens to be the most substantial part of her claim.
2. The Plaintiff said that soon after the accident, domestic helper had to be engaged to assist her in her daily life. Prior to that, the Plaintiff would need to be accompanied by her son outside home. The joint expert report in March 2006 recorded that the Plaintiff attended the medical examination with her domestic helper.
3. However according to Dr. Au’s report in January 2003, the Plaintiff was still accompanied by her son. On that occasion, Dr. Au was still recommending the engagement of domestic helper. According to her statement filed in November 2005, the Plaintiff was still merely estimating her need for part time domestic help. There was indeed no claim for incurred cost of domestic help by now or any documentary evidence in support of that. All these lead me to infer that the Plaintiff did not engage domestic helper until perhaps sometimes in 2006. That would have been after her heart surgery when her condition, particularly, of the left side of her body, became much worse than before.
4. The Plaintiff’s abilities demonstrated in court were indeed impaired. However, in view of the medical evidence, I am not convinced that but for the subsequent deterioration of her condition and abilities which was unrelated to the accident, the Plaintiff would have really needed to engage domestic helper. When Dr. Au appeared to be recommending the engagement of domestic help when the Plaintiff first saw him in January 2003, it was in fact the Plaintiff who claimed that need.
5. On balance, I am not convinced that the accident alone would have caused her any need to engage domestic help in the future. I therefore do not allow this item of claim.

**Summary**

1. In summary, the quantum of damages should be as follows:

Pain, suffering and loss of amenities HK$200,000

Hospital fee HK$ 9,407

Medical expenses HK$ 7,580

Travelling expenses HK$ 1,320

Tonic food HK$ 5,000

TOTAL: HK$223,307

1. Mr. Chan for the 1st Defendant submitted that the Plaintiff had failed to proceed with her claim in a timely fashion. Therefore interest for a period of one year should be disallowed. Proceedings since the commencement of action had been vacated for a couple of times. But those were done by joint applications. As to whether there was inordinate delay on the part of the Plaintiff prior to the commencement of action, I did not hear sufficient argument to form such a conclusion.
2. Interest on damages for PSLA should have run at 2% per annum from the date of writ (23 February 2005) to today. Interest on special damages should have run at 5.375% per annum from the date of accident (16 March 2002) to today.
3. Inclusive of the interest, the total amount would have to be reduced by 50% on account of the contributory negligence to arrive at the final award which would have been made.

**ORDER**

1. Failing to prove liability, the Plaintiff’s claim is dismissed. The Plaintiff shall pay the costs of the 1st and the 2nd Defendant in this action including any costs reserved. Costs shall be taxed, if not agreed, with certificate for counsel. The Plaintiff’s own costs shall be taxed in accordance with Legal Aid Regulations. This costs order is nisi and shall become absolute in the absence of appointment to argue costs.

Simon Leung

District Judge

Representation:

Mr. Victor Gidwani instructed by Messrs. Simon Si & Co. (on the instruction of the Director of Legal Aid) for the Plaintiff

Mr. Daniel Chan instructed by Messrs. Winnie Mak, Chan & Yeung for the 1st Defendant

Mr. C K Wong instructed by the Department of Justice for the 2nd Defendant