DCPI408/2002

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 408 OF 2002

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| BETWEEN |  |  |
|  | KAM WAI MING | Plaintiff |
|  | And |  |
|  | MTR CORPORATION LIMITED  CNIM-HONG KONG LIMITED | 1st Defendant  2nd Defendant |

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Coram: H H Judge Carlson in Court

Date of Hearing: 9, 10 December 2003

Date of Judgment: 11 December 2003

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JUDGMENT

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*Introduction*

1. The Plaintiff, Mr Kam Wai-ming, is a 29-year-old chef who is employed in the kitchens of the Marriott Hotel at Pacific Place. On 6 May last year he was making his way to work from his home at Tsuen Wan when he was injured. What happened was that he was travelling down an escalator at Tsuen Wan MTR Station, making his way to the platform, when the escalator unexpectedly stopped, causing him to roll down the escalator. He came to a stop on about the 10th step from the bottom of the now stationary escalator, having dislocated his right shoulder in the course of his fall. He now brings this action for damages for personal injury and other consequential losses.
2. The 1st Defendant, the MTRC, are sued as the operators of Tsuen Wan Station for breach of the common duty of care cast upon them by the Occupiers’ Liability Ordinance, for negligence and for breach of contract. The 2nd Defendants, who are the Hong Kong subsidiary of the French manufacturers of the escalator and who were retained by the 1st Defendants to service and maintain the escalator, are sued for their alleged negligence in not doing their job properly and ensuring that the escalator was safe to use by persons riding on it.
3. The Defendants deny negligence, and also plead contributory negligence on the part of the Plaintiff in not holding onto the handrail as he rode the escalator and thereby not taking sufficient care for his own safety.
4. This is what the case is all about.
5. Quantum is relatively uncomplicated, where the parties have sensibly jointly instructed an orthopaedic surgeon to prepare a report on the Plaintiff’s injury.

*The Evidence*

1. I can briefly summarise the evidence on both sides.
2. The accident occurred at about 6.36 am before the start of the main rush hour into work. The Plaintiff used this way of going to work every day. He purchased a newspaper at the entrance to the station and made his way onto the escalator (E8), where he stood on the right-hand side as required by the various notices directed to users of the station. In his left hand he held the newspaper, which was in the plastic bag that it had been sold in. He says that he used his right hand to take hold of the moving handrail. Without warning, he says, the escalator stopped and with such abruptness that this caused him to lose his grip on the handrail so that he lost his balance and fell down the steps.
3. The fact that the escalator had come to a stop was immediately recorded on the control panel at the station, and with that, Mr K Y Chan, the station master on duty, went to investigate. He found the Plaintiff on the 10th step from the bottom of the escalator, who complained of being in pain and unable to get up. Mr Chan prepared a report, which starts at page 143 in the trial bundle. He says that he asked the Plaintiff what had happened, and he told him that he had stood on the right of the escalator but as it stopped suddenly he was unable to take hold of the handrail, with the result that he lost his balance and fell. In order to confirm what had happened, Mr Chan says that he performed a short demonstration with the Plaintiff. He stood on the escalator himself with both hands at his side and asked the Plaintiff whether this was how the Plaintiff was standing at the moment when the escalator stopped, and the Plaintiff agreed that this was so.
4. The Defendants, of course, rely on this evidence to say that the Plaintiff was at fault and that this was the real cause of his fall. To this, I will need to make further reference in due course. It is from this that Mr Chan has also prepared his report, and at page 145 he has made two references to the fact that the Plaintiff was not holding the handrail.
5. There has been an additional suggestion that the Plaintiff was reading his newspaper at the time, which is said to reinforce the case that he did not have hold of the handrail. Nevertheless, I can dispose of this particular allegation now, because Mr Chan says that when he found the Plaintiff the newspaper was still in its plastic bag. I have no doubt that the Plaintiff, who had purchased the paper just outside the station, could not have removed it from the bag, read it and then put it back into the plastic bag between getting onto the escalator and falling down once it had stopped.
6. Presently I will need to return to another aspect of Mr Chan’s report as to the cause of the escalator stopping, but for present purposes, no further reference to this is necessary.
7. The Plaintiff has been closely challenged about his account of having held onto the handrail. On being pressed, he sought to reinforce his position by saying that he always held onto the handrail; that he always stood on escalators, never let his grip go by walking or running down them as circumstances might have dictated, such as when he saw that a train at Tsuen Wan Station - his local station - was about to pull out of the platform which would have been visible from the escalator.
8. For the sake of completeness, I should mention that Mr Chan then called an ambulance and also telephoned the Plaintiff’s family so that the Plaintiff was able to tell them what had happened.
9. In due course, I will need to make a specific finding as to whether the Plaintiff was holding onto the handrail when the escalator stopped, but I can conveniently leave that over to when I indicate my findings on the evidence overall.
10. The main parts of the evidence on liability relate to the reason why the escalator had come to a sudden and unexpected stop.
11. It is helpful to start by describing the regime which the 1st Defendant’s have in place for the repair and maintenance of this escalator and, indeed, for the vast number of escalators which are in use all over the MTRC’s network. The manufacturers, as I have already indicated, are the 2nd Defendant’s French parent company. They are one of the world’s leading manufacturers of such equipment. The 1st Defendants have, sensibly, therefore contracted the 2nd Defendant to do the servicing of this equipment.
12. As with any equipment which affects the safety of the travelling public, and indeed, users of escalators in Hong Kong in general, the government is vigilant to ensure that public safety is not compromised. An Ordinance has been enacted. It is called The Lifts and Escalators (Safety) Ordinance, Cap.327 (“the Ordinance”), which sets out in detail, *inter alia*, how such equipment should be serviced, the frequency of such servicing, and a code of practice. The relevant department of government is the Electrical and Mechanical Services Department (“EMSD’’), and it has produced a code of practice on the design and construction of lifts and escalators, an extract of which appears at pages 63 to 113.
13. It is not in dispute that the escalators - and this one in particular - in all respects conformed with this code.
14. The 2nd Defendants employ a substantial team of technicians to carry out the service and maintenance work. All of these technicians have obtained the relevant government approved qualifications to do this work. They are described as “competent” within the terms of the Ordinance. Their names are in a list starting at page 155 of the bundle. And all of those who worked on this escalator are not only statutorily “competent”, but also have many years of working experience.
15. The evidence shows that there are three types of inspection that is carried out and that had been carried out on the MTR’s escalators, including this one, E8. Firstly, a yearly inspection, which, in this case, took place on 23 November 2001, some four and a half months before the accident. The details of the inspection were recorded in writing and submitted, as required, to the EMSD.
16. The report, which is at page 130 of the bundle and certified by Mr Ho Chung-wai, now a senior member of the 2nd Defendant’s staff and a very experienced and highly qualified person in such matters, shows that there were no mechanical problems with the escalator. It was functioning properly and was in safe working order: particularly, the machine brake and the emergency brake. The escalator’s stopping distances were 330 millimetres, or 1.28 feet, and 400 millimetres, or 1.31 feet, when moving downwards and unloaded. This means that the escalator would slide on for 1.31 feet, once the braking system was engaged, before it came to a halt. These distances are within the parameters set by the EMSD.
17. A half-yearly inspection had taken place on 27 May 2001, which was 12 months prior to the accident - this is at page 128 - and it is also certified by Mr Ho. Again, the inspection showed that there were no defects, that it functioned normally, and that it was in safe working order. Braking distances were broadly similar to those on the yearly inspection. When moving downwards and unloaded, the braking distance was 390 millimetres, 1.28 feet. The EMSD parameters allow for a range of 350 millimetres, 1.15 feet, up to 1,500 millimetres, 4.92 feet.
18. There are also weekly inspection reports. These reports have also been put into evidence. They are for the 1st, 8th, 15th and 29 April 2002. The most recent, on 29 April, was a week before the accident. That report is at page 136.
19. The inspection record notes that combs, fault indication panel and emergency stop button, amongst other working parts, were looked at and were found to be in good working order. This inspection was carried out by “a competent” and experienced technician, as required by the Ordinance.
20. Pausing there, one can see that the inspection and maintenance regime required by the Ordinance had been fully complied with by the 1st Defendant and its maintenance contractor, t he 2nd Defendant, and that, as of 29 April 2002, escalator E8 was in proper working order.

*The Investigation*

1. I now come to the investigation of what had caused the escalator to stop at 6.36 am on 6 May, when the Plaintiff was riding on it.
2. In the way of these things, the matter was thoroughly investigated and the findings of the investigation have been recorded in a number of documents, all of which are in evidence.
3. The “Undesired Event Report” at page 143 was compiled by Mr K Y Chan, who, as I have already observed, was the first on the scene. As to the references of a technical nature, he has recorded that the control panel alarm had gone off at 6.36 am, showing that the escalator had stopped but with no indication of any fault. What he has recorded, which may be of significance, is that Mr W Y Chow of the 2nd Defendants, who was the technician who had come to investigate the matter, had “confirmed” that the escalator had gone back into service after adjustment of a sensitive CPLR, which is the code plate switch about which I must say more in a moment.
4. The other MTR document of importance is their Form A, an incident report form (page 148). This records that the MTR station maintenance team and the 2nd Defendant’s staff had confirmed that the stopping of the escalator had been caused by the CPL being too sensitive. Nevertheless, the MTR technical investigation report at page 277 notes that the common safety switches were normal, which description includes the CPL.
5. At page 147, which is part of the 2nd Defendant’s Occurrence Report, the reason for the CPL being triggered and which caused the escalator to stop was due to a “heavy thing”, which, as I will need to explain further in due course, was different from the other reason given, which was the CPL being over-sensitive. I also need to refer to the 2nd Defendant’s Log Book recording the investigation and its results (see page 335B). In column 8, which is in Mr Chow’s handwriting, there is the following record, “CPLR floor plate switch check.” There is no reference to it being too sensitive. The braking distances were also measured and recorded and these were found to be within proper parameters.
6. Mr Chow, who has given evidence, has denied that the CPL was too sensitive. He measured it with a gauge and found it to be within the appropriate range of 3 to 4 millimetres. Mr Chow has said that the equipment was in perfectly good order. His evidence is absolutely crucial as to the cause of the escalator having stopped.
7. The reason why the investigation centred on the CPL and its significance is a matter that I should now explain. In this regard I am assisted by photographs and a diagram. The photographs are at page 309 and 310, and the diagram is at page 335C.
8. The comb is shown in the photographs and it is clear why it is so described. There is a comb at the top and bottom of the escalator. It is there as the escalator steps feed into the underside of the escalator system as they travel round from top to bottom. The comb is there to trap foreign objects from entering the system below the visible parts of the escalator. There is a certain tolerance which is preset. Not every foreign object will trigger the safety switch so that a particularly small object which may cause no harm may well slip through undetected by the sensors. Some objects are no doubt deemed harmless and could be removed in the course of the weekly inspection.
9. If the sensors are too sensitive, then there would be a very high incidence of escalator stoppages with all the inconvenience that this would entail. On the other hand, the sensors should not be so tolerant as to allow larger objects to become trapped in the escalator system where they might cause damage. It has been determined by the manufacturer that the sensors should be set at 3 to 4 millimetres, which achieves a proper balance between over-sensitivity and over generous tolerance to foreign objects.
10. Mr Chow who investigated the system was unable to discover any extraneous object trapped in the CPL. He also looked for anything that might have got through and fallen into the well of the system underneath the escalator belt but was able to find none. As a result, he has said that the likeliest explanation for the stoppage was some heavy force being applied over the comb plate which has a spring-like quality. When pressed down it would have no effect, but on the rebound, rather like a diving springboard, it would bounce back and engage the sensor, which in turn would cause the braking system to activate itself and stop the escalator.

*The Cause of the Stoppage?*

1. From that summary I must try to determine, if I can, what caused this stoppage.
2. There are three candidates: firstly, a trapped foreign body which, on a balance of probabilities can, I think, be excluded because Mr Chow found none; secondly, a heavy force, like a large man jumping onto the comb plate or crossing over it with a heavy suitcase or other “cargo” such as a trolley. There is no direct evidence of that and that would really amount to speculation. The third is an over-sensitive CPL switch.
3. I have referred to where this is mentioned in the reports, and there is also a reference in Mr Chow’s witness statement (page 280) to the CPL switch not being able to be activated unless it was forced open by 2 to 3 millimetres, which, of course, is more sensitive than the 3 to 4 millimetres recommended by the manufacturer. Mr Chow says that reference is a mistake and that it should have read 3 to 4 millimetres. The next sentence in the witness statement refers to “this being the normal standard and that the CPL was not sensitive.” Mr Ng for the Plaintiff has quite rightly seized on this reference as further evidence in support of the case that the CPL was too sensitive.
4. My judgment of this is that whilst there are “straws in the wind” indicating an over-sensitive CPL, there is also a strong body of evidence pointing to a properly set switch at 3 to 4 millimetres. I am unable to hold that this stoppage was caused by a sensitive switch. Regrettably, whilst one can perhaps safely eliminate a trapped foreign body, I can go no further and I am not able to say to the required degree (a preponderance of probability) why the escalator stopped. I can say no more than it may have been a heavy weight on the CPL or that it may have been an over-sensitive switch. The evidence is equivocal as to both of these causes.
5. Where does that take me?
6. Mr Ismail for the 2nd Defendant says that it does not matter why this escalator stopped. Escalators are designed to stop, and those who ride on them do so realising that they might well stop and should take the precaution of holding onto the handrail to prevent a mishap of the type that occurred on this occasion.
7. An escalator is a trade-off between convenience for its passengers and the risk of an emergency occurring which may require an emergency stop; for example, a child’s shoelace getting trapped between the steps, or an article of clothing getting entangled. That risk is addressed by balancing the speed of travel of the escalator and the appropriate stopping distance. It cannot be right that the escalator should stop instantaneously. If that were so, inertia would cause passengers to topple into each other like dominos. For that reason, the mechanism is such that once the brake is engaged, the escalator will slide by as much as 4.5 feet before it comes to a halt. In this case, it slid 1.31 feet.
8. Its pre-stopping speed is also crucially important. It was measured in this case at 2.46 feet per second, which is 8,856 feet per hour, which comes to about 1.8 miles an hour - a very leisurely walking pace.
9. Mr Ho says this has been tested, and provided one has hold of the handrail, an emergency stop will not cause a passenger any problem. It is only the inattentive passenger who does not have a grip of the handrail that exposes himself to the risk of a fall.

*The Law*

1. Surprisingly, there are no escalator cases in Hong Kong to which reference can be made, but Mr Ismail, with his customary thoroughness, has found some from Canada, which I have found extremely helpful.
2. The first is *Naicken v Edmonton City* [1997] AR Lexis 1507; 197 AR 331, a decision of Langston J, a first instance decision in the Alberta Court of Queens Bench. He describes the duty imposed on persons who have control of escalators as follows:

“The duty imposed on persons who have control of escalators is one of the highest order and it requires a standard of the ‘highest practical degree of care’. The plaintiff pleads the provisions of the Occupier’s Liability Act”...

- our equivalent to the Occupiers’ Liability Ordinance -

“...and relies on ss. 5 and 6 of the Act”...

- the equivalent sections are there in the Hong Kong Ordinance -

“... which reads as follows.

‘An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he has invited or permitted by the occupier to be there or is permitted by law to be there.’”

1. Mr Ng, perfectly reasonably, also relies on the doctrine of *res ipsa loquitur* in support of his case. He says that whatever caused this to happen must have been caused by the Defendants’ collective negligence. This was, if I may say so, very helpfully addressed by Langston J from paragraphs 25 to 37 of his judgment, which I ought to set out in full.

“ The plaintiff also pleads the doctrine of ‘res ipsa loquitur’. The plaintiff must prove negligence on the balance of probabilities which means that it is more likely than not that the defendant was to blame for the plaintiff’s injuries. If evidence shows only that the defendant may have been fault, the plaintiff must fail.

There must be reasonable evidence of negligence. But if something is under the sole management and control of another and an incident occurs which would not ordinarily occur if due care was exercised, it may be inferred, in the absence of an explanation, that the incident resulted from lack of care. The doctrine of ‘res ipsa loquitur’ is applicable in those situations where the facts are unknown. It is only a rule of evidence which does not affect the onus on the plaintiff to prove negligence.

The plaintiff takes the position that she can, by means of ‘res ipsa loquitur’, avail herself of an inference that there must have been negligence by the very nature of the occurrence; that is, a stoppage of the escalator and her subsequent injury.

The doctrine of ‘res ipsa loquitur’ has its foundation in the concept that the defendant should not be able to thwart a legitimate claim by the plaintiff by means of his silence or his unilateral control over those matters which would otherwise provide evidence. Today the doctrine is generally accepted as having three elements. Quoting from Clerk & Lindsell on Torts. The doctrine applies:

‘(1) when the thing that inflicted the damage was under the sole management and control of the defendant, or someone for whom he is responsible or whom he has a right to control;

(2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition.

(3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to ‘res ipsa loquitur’ is inappropriate, for the question of the defendant’s negligence must be determined on that evidence.’

The two elements, (1) control by the defendant, and (2) lack of evidence, harken back to the historical roots of this doctrine. The remaining element relating to the drawing of an inference as to negligence, is in essence a common sense application of circumstantial evidence. In the present case, to the extent that they controlled the premises there is no doubt that the defendants had sole management and control of whatever inflicted the damage to the plaintiff. Additionally, it may be appropriate to draw an inference that an injury would not normally occur on an escalator if due care was exercised.

The difficulty however arises with the remaining element dealing with the absence of evidence or the absence of an explanation.

If an inference, in the absence of evidence, is properly drawn that the incident was caused by negligence, it is obvious that the plaintiff will succeed unless there is some evidence to displace the inference. The evidence required of the defendant in such a situation must be consistent with the facts and must be viewed as a probable cause, not a theoretical possibility. In essence, the test is that for circumstantial evidence, in that the court must be satisfied that the inference to be drawn is consistent with the act having taken place as the result of negligent conduct and it is inconsistent with any other rational conclusion.

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.

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 use.

However, 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. Common sense and common experience suggests that the device must react quickly in situations where people are caught in the device, either on its sides or in the protrusions which form the steps. Equally the device must not stop so suddenly as to propel riders off the steps. It is this balance of needs which is addressed by the various codes referred to by the technical witnesses, in relation to the stopping distances of such devices.

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 the standards were met, those standards inadequately 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.”

1. This decision was approved in another escalator case by the Court of Appeal of Newfoundland in *Empire Company Limited v Sheppard*, 103 ACWS (3d) 436. The Chief Justice of Newfoundland, Wells CJ, described the problem in this way:

“Even though the evidence as to the nature of the escalator is scanty, from that evidence together with the facts in respect of which it is appropriate for a court to take judicial notice, including the extensive use of escalators in areas frequented by the general public, it can be inferred that an escalator is not inherently dangerous. However, because of the combination of its steel or other metal moving parts; its steel or other metal stationary parts contiguous to the moving parts; and the amount of power it is capable of exerting on the moving parts, at the very least, 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.”

1. I am satisfied that these two cases properly reflect the law in Hong Kong as well, and I propose to apply that approach to the facts of this case.

*Was the Plaintiff Holding Onto the Handrail?*

1. But before I do so, I propose to now indicate how I find on the question of whether the Plaintiff had hold of the handrail when the escalator unexpectedly stopped. I am satisfied that he did not.
2. Firstly, I find the Plaintiff on this issue unconvincing. He said that he held on, on this occasion, and then he continued, by way of underlining this suggestion, to say that he always held on, that he never walked or ran down an escalator even if he saw that a train was shortly to move out of the platform. He would be prepared to miss that train and not depart from his practice of remaining stationary on the step and holding onto the handrail. In my judgment, he rather protested too loudly about that. This was an exaggeration which detracted from his credibility on the main issue.
3. Secondly, I find Mr Chan, the station master, an excellent witness. I believed him when he told me that the Plaintiff had said that he had not been holding onto the handrail. He then did a small demonstration, which the Plaintiff agreed with. This all had the ring of truth about it. Mr Chan would, after all, have wished to know how this had happened. Mr Ng suggested that the Plaintiff, who was in pain, would not have said anything like that, nor would he have watched or been interested in any demonstration that Mr Chan was about to carry out.
4. I accept that he was in pain, but it is not suggested that he had been engaged in anything complicated by Mr Chan. This was a short, simple conversation and a straightforward demonstration. In any event, the Plaintiff was in a fit enough state to speak to his family when Mr Chan rang them on his mobile telephone.
5. Lastly, although perhaps not quite so significant, is Mr Ho’s evidence about the tests which had been conducted and which had shown that a reasonably careful adult holding the handrail would not be adversely affected by a sudden stopping of a moving escalator travelling at an appropriate speed, such as this escalator was travelling on this occasion.
6. For all these reasons, I am satisfied that the Plaintiff did not have a hold of the handrail when the escalator came to a halt.

*The Result*

1. 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.
2. 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 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 an emergency, or at all events, at an unpredictable moment, and with that in mind, a passenger is to be 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.
3. Mr Ng has sought to make the point that if there was a fault on this occasion, then the Defendants cannot really rely on the second part of this analysis, that escalators do stop in any event and that passengers must be prepared for such contingencies. His point is that if there was no defect, it would not have stopped and therefore his client would not have been injured.
4. Attractive though that submission may be, it ignores the evidence. I have not been able, on my analysis of the evidence, to hold that there was any defect, although I have also been unable to pin down the precise reason for the unexpected stop. *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.
5. Ultimately, the proximate cause for these injuries, the *causa sine qua non*, was the fact that the Plaintiff did not have hold of the handrail. The *causa causans*, the unexpected stop, provided the setting against which the accident occurred but that has not been shown to be the result of any negligence or breach of duty on the part of the Defendants, with the result that the action must fail. That being so, there must be judgment for the Defendants.
6. The fact that the Plaintiff was not holding onto the handrail is also relied on by the Defendants as an allegation of contributory negligence which, because I have dismissed the claim, I am not required to give specific consideration to, save to the extent that it is this which had caused the Plaintiff to fall.
7. It would now be artificial for me to embark on an assessment of the percentage of contributory negligence had I found for the Plaintiff, and in any event, the Court of Appeal, if it was required to make such an assessment, would be able to do so without my embarking on such an analysis. I have found entirely for the Defendants and I am content to leave the matter on that basis.

*Quantum*

1. I can give an assessment as to the damages and I do so in order to avoid the matter being remitted to me in the event of a successful appeal, and so these are the damages that I would have awarded on the basis of full liability had I found for the Plaintiff.

Pain, suffering and loss of amenity

1. Subject to a comment that I must make in a moment, I would have awarded $100,000. The Plaintiff has sustained an unpleasant injury which still causes him problems. It limits his ability at work in terms of lifting things, and there is also a 30 to 40 per cent risk of further dislocation. Additionally, he suffers pain from time to time and he can no longer play racquet sports, which he greatly enjoys, as well as soccer. These matters must sound in damages and the $100,000 award seems to be appropriate, subject, as I say, to a further comment that I will make on future medical expenses.

Pre-trial loss of earnings

1. The Plaintiff claims $7,121, which is his salary and bonus whilst he was on sick leave. The history of the bonus is that although discretionary, I am satisfied on a balance of probabilities that he would have received that bonus. The only disagreement between the parties as to this head of claim relates to the bonus, and as I have found that he would have received that bonus, I would therefore have ordered the amount claimed of $7,121 under this head of damages.

Future medical expenses

1. He claims $70,000, being the cost of private surgery in the event of a future dislocation of his shoulder. At a public hospital, the procedure would have come to $4,000 or so. No doubt the Plaintiff would prefer the comforts of a private hospital, but the test is whether that is reasonable. He had originally been treated perfectly well in the public sector by way of emergency. Really, I can see no reason why he should be awarded a further amount for private treatment, that in any event may never be necessary, particularly where competent and appropriate treatment is available at a public hospital. The way I approach this is to add $4,000 to the claim for pain and suffering as part of the general damages to cover the cost of this if the occasion arises. So, whilst without this additional amount, the appropriate damages would have been $100,000 under this head, I am going to award a further $4,000, making a total of $104,000 for pain and suffering and loss of amenity, and I do so for that reason.

Future loss of earning

1. This is to cover any period that the Plaintiff would be off work if he needed a further operation. Three months is said to be the appropriate period, and the calculation is based on current earnings. This in my judgment is too uncertain to be compensated for. He may never need that surgery, which has been put at a 30 to 40 per cent chance. If I award him this, he may never need to call on this of money. The claim is too uncertain to be sustained.

Future loss of earning capacity

1. The only remaining claim of substance, which is for loss of earning capacity in the sum of $240,000.
2. Mr Ismail has drawn attention to two cases which demonstrate the approach, and I will refer to them now. The first is the Privy Council decision of *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176, where the opinion of the Board was given by Lord Fraser of Tullybelton, where he at page 183 C to D said the following:

“A claim for future loss of earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk -- see *Moeliker v A Reyrolle & Co. Limited* [1977] 1 WLR 132, 140, where Browne LJ dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant’s age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.”

1. In the present case, there is no evidence at all on these matters. Mr Ismail then drew attention to the case of *Moeliker v A Reyrolle & Co. Limited* [1977] 1 WLR 132, where at page 141, B to D, Browne LJ had this to say:

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether this is a ‘substantial’ risk or is it a ‘speculative’ or ‘fanciful’ risk: see *Davies v Taylor* [1974] AC 207, Lord Reid at p. 212 and Lord Simon of Glaisdale at p. 220. Scarman LJ in *Smith’s* case referred to ‘real’ risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employer’s business; the plaintiff’s age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no ‘substantial’ or ‘real’ risk of the plaintiff losing his present job during the rest of his working life, no damages will be recoverable under this head.”

1. I can discover no evidence on this matter to justify an award of the type now sought. He has retained his job at the Marriott, he has been there since he finished his sick leave - some 18 months ago - and I cannot see how he can sustain this head of damages without any compelling evidence to support it. I appreciate that he may have some difficulty in carrying heavier weights, but he enjoys the assistance of his co-workers and there is nothing to suggest, given the fact that the Marriott Hotel has been willing to continue employing him for all this period of time, that he is at any risk of the sort contemplated by Browne LJ of losing his job, and so this part of the claim fails.

Specials

1. Finally, there is a very modest claim for special damages in the sum of $2,378, which is agreed, and I would have awarded that.
2. These are the sums that I would have awarded had the Plaintiff been successful.
3. Judgment for the Defendants with costs. Legal Aid taxation of the Plaintiff’s costs.

Ian Carlson

District Court Judge

Mr Ludwig Ng and Ms Eunice Ip, of Messrs Or, Ng & Chan, for the Plaintiff

Mr Colin Wright, instructed by Messrs Deacons, for the 1st Defendant

Mr Anthony Ismail, instructed by Clyde & Co., for the 2nd Defendant