# DCPI 417/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 417 OF 2006

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BETWEEN

## FUNG SIU LING Plaintiff

### and

PROSPERITY LAND ESTATE

MANAGEMENT LIMITED Defendant

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Coram : His Honour Judge Stanley Chan in Court

Dates of hearing : 10th September 2007 – 12th September 2007

Date of handing down of judgment : 21st November 2007

**JUDGMENT**

1. The Plaintiff claims damages against the Defendant for personal injuries sustained by her on 12 April 2003 when she tripped over a kerb near the entrance of Royal Jubilee Plaza at No.88 San Shing Avenue, Shek Wu Hui, Sheung Shiu.

2. It was accepted by Counsel for the Defendant that the Plaintiff was a lawful visitor within the meaning of the Occupiers Liability Ordinance Cap. 314 (‘OLO’). There is no dispute that the Plaintiff tripped outside the main entrance of the Plaza at about 7:16 am on 12 April 2003 and sustained personal injuries. Remedial measures were made by the Defendant on 12 April 2003 and in July 2003 respectively. The quantum of damages was agreed. A site visit to the scene was also arranged on 12 September 2007.

3. The Plaintiff was diagnosed to suffer from pain over posterior aspect of the right elbow. X-ray examination of the right elbow showed fractured right radial head and displaced fracture of lateral epicondyle. PW1 was hospitalised from 12 April to 20 April 2003. Open reduction and internal fixation was performed and PW1 was put on a brace for 9 weeks. Follow-up therapy sessions were attended. The Plaintiff, who was a civil servant working as a clerical assistant at the time, was granted sick leave for a total of 314 days and subsequently returned to her pre-accident occupation on 1 March 2004.

## Issues

4. There are 3 issues in this claim:

(1) whether the Plaintiff sustained injury in the way she described?

(2) whether the Defendant was liable for the Plaintiff’s injury?

(3) whether the Plaintiff was contributory negligent in this accident?

I. *Whether the Plaintiff sustained injury in the way she described?*

5. From the photos and the site visit, it is apparent that the kerb and the steps at the entrance of the Plaza are of the same colour. There existed small difference in height, which was about 2 to 3 inches, between the kerb and the first step. At the time, there was no warning notice. The kerb in question is on the right hand side of the entrance next to a large cylindrical column. The hidden danger of the existence of the kerb could not be easily discerned. On the left hand side, the platform edge and the kerb to the left were fenced off by a handrail for the disabled. [[1]](#footnote-1)

6. At about 7:16 am on 12 April 2003, the Plaintiff was on her way to work. She intended to enter into the Plaza through the right main entrance door which was open at that time. In the course of walking onto the first step, she tripped over the kerb of the raised platform. As a result of that, she fell forward and landed on her right elbow. At that time, the Plaintiff said there was no reflective yellow-and-black stripes plastic stickers attached onto the steps as shown on photo A at p. D-110. There was no warning sign or poster on the right cylindrical column at the entrance as shown at the photos. The small and white temporary warning sign on the left column [[2]](#footnote-2) was later replaced by a permanent one as shown in photo B at p. D-114. The warning sign was put up after the accident.

7. The Plaintiff said that she moved to the current address on 30 September 2001 and often did not pass through the Plaza to go to the railway station. On the material day, she related the accident to the guard but did not go to the hospital right away. However she eventually went to North District Hospital for seeking treatment.

8. The standard of proof in civil cases is one of balance of probabilities. In the present case, there was no independent witness. Based on her evidence in court, I find the Plaintiff a credible witness and accept her version of events as to how the accident happened and her injury so sustained. She was about to use the right door to enter the Plaza and in doing so, she tripped over the kerb and fell down. DW3 Leung Chung Yin, the building supervisor of the Defendant, accepted that there was a verbal report of the accident, and that the Plaintiff did not go to hospital right away because she was in a hurry to go to work.

II. *Whether the Defendant was liable for the Plaintiff’s injury?*

9. The Defendant does not dispute that the Plaintiff was a lawful visitor of the Plaza and the Defendant was the occupier at the material time. Consequentially, the Defendant has the occupiers liability and owed to visitors the common duty of care in accordance with section 3 of the OLO.

10. I find that the Defendant, as the occupier, was liable to the Plaintiff’s injury. There existed an undesirable design of the steps and kerb. The kerb is small in area, and its corner abuts against the first step. There was an absence of conspicuous warning signs on both cylindrical columns at the entrance of the Plaza at the time. After the accident had occurred, the Defendant took the initiative to post more reflective yellow-and-black coloured stripes stickers on edges surrounding the steps and kerb. Certain measures were implemented to warn visitors of the potential danger of the kerb and steps. It is not difficult to see that practical and effective measures can be effected to reduce the risks that visitors may encounter, e.g. to redesign the kerb and steps, to place handrail at the corner of the kerb similar to the one on the left hand side of the entrance, to place a plastic cone at the kerb and/or to place more warning signs and reflective tapes.

11. In *Francis & Others v Lewis* [2003] NSWCA 152, Mason P held that:

“Forseeability of risk of injury is not determinative of breach of duty of care. … The duty is one of reasonable care … the duty is only to take care which is reasonable under the circumstances.”

12. However, in the present case, the risks involved, in my view, cannot be said as a remote possibility. Visitors are expected to use the steps and might get tripped over by the existence of a kerb which is abutted against the first step. It is reasonable to expect the occupier to take measures in the present case to reduce the risks that visitors may get tripped, and yet this was not done before the accident.

III. *Was the Plaintiff contributory negligent in this accident?*

13. There is no evidence to suggest that the Plaintiff walked too fast which caused her tripping over at the kerb. Although there is no positive duty for the Plaintiff to get acquainted with the settings of the area, being a resident in the vicinity since September 2001, the Plaintiff should not be taken as a total stranger to the area. The Plaintiff did say that she had used the entrance previously though not frequently.

14. However, it is noted that the kerb in fact is close to the cylindrical column and one would expect visitors should pay attention to steps when entering the Plaza. It is not reasonable for an occupier to assume total liability whenever there is an accident. This is a balancing exercise depending on circumstances of each case. I find that the Plaintiff was partly to blame when she tripped over at the kerb. Visitors are expected to walk carefully whenever staircase or flights of steps are involved. Visitors are also expected to take care of their own safety when an everyday risk is involved.[[3]](#footnote-3)

15. The Plaintiff seemed to have taken a relatively sharp turn upon reaching the right hand cylindrical column at the entrance. It is to be noted that the fact that DW1 Chan and DW3 Leung were not aware of other accident occurring at the Plaza similar in nature to the Plaintiff’s one was neither here or there, as the accident might simply not be reported.

16. Counsel for the Defendant submits that even if the Defendant was liable, the Plaintiff should be 75% responsible for her own injury. Counsel for the Plaintiff submits that the Defendant should be fully liable. Although this was not a everyday risk in which person using steps may misjudge their footing and slip, the Plaintiff being not a total stranger to the setting also has a duty to take care of her own safety. By taking a sharp turn when she passed the right cylindrical column, she has exposed herself to the inherent hazard posed by the existence of the kerb and the steps.

17. In the circumstances of this case, I find that the Plaintiff is 30% liable for her injury so sustained from the accident.

## Agreed Quantum

18. Both parties agree the quantum as follows:

1. Damages for Pain Suffering and Loss of Amenities: $200,000
2. Special Damages: (a) Loss of earnings: $40,000

(b) Pecuniary expenses: $3,160

(3) Loss of vacation leave and sick leave: $10,000

Total: $253,160

19. As the Plaintiff is found to be 30% liable, the net sum that the Defendant is liable is $177,212.

## Decisions

20. There will therefore be judgment in favour of the Plaintiff against the Defendant in the sum of $177,212.

21. Interest on the sum of $140,000 for PSLA (being 70% of the agreed quantum of $200,000 under this heading) is at 2% from the date of the writ to the date of judgment. Interest on special damages ($30,212) is at half of the judgment rate from 12 April 2003 (the date of accident) up to the date of the judgment. As agreed between the parties, no interest is to be awarded relating to the loss of vacation leave and sick leave.

22. There will be a costs order nisi that the Plaintiff’s costs of this action be paid by the Defendant with certificate for counsel, such costs to be taxed if not agreed. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations. Such costs order will be made absolute 14 days after handing down of this judgment.

( Stanley Chan )

District Judge

Representation:

Mr. Simon Lam instructed by Messrs. Andrew Chan & Co. for the Plaintiff.

Mr. Jonathan Chang instructed by Messrs. Chan, Lau & Wai for the Defendant.

1. Photos at pp.D-110 to118 and D-239 to 244. [↑](#footnote-ref-1)
2. Photo B at D-110 [↑](#footnote-ref-2)
3. Stannus v Graham (1994) Aust Torts Reports 81-297 at 61-566 per Handley JA which was cited at Francis & Others v Lewis (supra) [↑](#footnote-ref-3)