## DCPI 440/2005

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 440 OF 2005

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##### BETWEEN

## LEUNG HO MIMI Plaintiff

and

#### MORNING CORPORATION LIMITED Defendant

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Coram : Her Honour Judge C.B. Chan in Court

Dates of Trial : 25th & 26th April, 2006

Date of Handing down Judgment : 14th June 2006

J U D G M E N T

1. The Defendant is and was the occupier of Shop 2076, Level Two, IFC Mall, 8 Finance Street, Central, Hong Kong (“the Shop”), which Shop included an open area on Level Two of IFC Mall where it carried on the business of a restaurant under the name of Le Parisien (hereinafter referred as “the Restaurant”). The business of a restaurant carried on by the Defendant at the common/open area immediately outside the Shop at the IFC Mall was with the permission from the owner and/or the manager of the IFC Mall.
2. On the 26th day of May 2004, the Plaintiff was a customer and lawful visitor of the Restaurant and she was accompanied by a friend to have afternoon tea at the Restaurant.
3. It is not disputed that at or about 4 p.m. on the 26th May 2004, when the Plaintiff proceeded to leave the Restaurant after finishing her afternoon tea, the Plaintiff fell on the marble floor and fractured her right public rami as she got up from the chair on which she was sitting. It is the Plaintiff’s case that the chair on which the Plaintiff was sitting (“the Chair”) slipped on the polished marble floor as the Plaintiff stood up.
4. It is the Plaintiff’s case that the accident was caused by the breach of common duty of care under the Occupiers’ Liability Ordinance (Cap. 314) and/or by reason of the negligence of the Defendant, its servant and/or agents.
5. The Particulars of Negligence pleaded by the Plaintiff with the explanation from the Better and Further Particulars supplied by the Plaintiff show that the Plaintiff claims that the Chair was light in weight and the legs of the Chair were wholly made of aluminium, which were particularly slippery and unsuitable for the polished marble floor.
6. The Plaintiff also pleaded that the Defendant had failed to warn her that the Chair was unsafe or unsafe for the slippery marble floor or that the polished marble floor was slippery.
7. Following the said accident, the Plaintiff was admitted to Canossa Hospital on the 26th May 2004.
8. Medical examination found that the Plaintiff suffered fracture of right pubic rami. The Plaintiff stayed in Canossa Hospital for 7 days and was discharged home on 1st June 2004. On discharge, the Plaintiff had follow-up treatment at Canossa Hospital on 7th July 2004. No permanent disability was found. In this Action, the Plaintiff claims damages for pain suffering & loss of amenities and special damages.
9. The Defendant in the Amended Defence denied negligence or breach of the common duty of care under the Occupiers’ Liability Ordinance (Cap 314) and further pleaded that if the Plaintiff did suffer injuries, loss or damage as alleged, denied by the Defendant, such was caused or alternatively contributed to by the negligence of the Plaintiff. The particulars of the contributory negligence pleaded by the Defendant were:
   1. Failing to use the Chair properly;
   2. Sitting on the edge of the Chair;
   3. Failing to stand up with sufficient physical strength;
   4. Failing to keep her balance on standing up; and
   5. Physical weakness due to Achilles tendon rupture right ankle and/or other pre-existing physical problems.
10. The Defendant also denied that the alleged injuries, loss or damage were caused to the Plaintiff as pleaded by the Plaintiff.

The Issues

1. Whether the Defendant was negligent.
2. Whether the Plaintiff contributed to the accident by her negligence.
3. The quantum of damages.

The 1st Issue

1. It is not in dispute that immediately before the accident, the Plaintiff was seated with her friend Madam Chan Suet Wah (“Madam Chan”) at a table in the common/open area immediately outside the Shop at the IFC Mall on a rattan Chair which had a frame made from light metal material which seemed to be made of aluminium or an aluminium alloy. The Chair was said to be similar to that shown on the right photograph at page 152 of the Bundle of Documents (BD”). Prior to sitting down she had been walking with Madam Chan in the IFCII Mall and she had bought some clothes and a pair of shoes. She was carrying these when she sat down for afternoon tea.
2. At the time of getting up from her Chair at or around 4:10 p.m., after settling the bill, she used both of her hands to press on the metal arms of the Chair to push herself up from her Chair. She did that by placing her hands on the handles, or arms of the Chair and she used her legs to stand up. The Chair slipped backward all of a sudden. As the Chair slipped backwards, she could not hold onto the handles or arms of the Chair. At that point she had not yet stood up straight. She fell heavily onto the floor. She was in severe pain.
3. Some passers by and Madam Chan held her and lifted her up to sit on the Chair. She telephoned her son who came and she was then sent by ambulance to Canossa Hospital.
4. There is no dispute that the Chair was light and the legs of the Chair were made of aluminium or aluminium alloy as with the rest of its frame. When she sat on the Chair, she had not thought that there would be any danger from sitting on the Chair because she thought that since the Defendant restaurant had put the Chair out it would be safe.
5. Upon questioning under cross-examination she stated that she knew that she was sitting on a light Chair but she did not know that the Chair could slip and slide on the marble floor. Upon cross-examination she said that when she went to the restaurant and sat down, she just pulled the Chair to sit down. She did not notice how light it was, unlike pulling the very heavy chairs at the Four Seasons Hotel Coffee Shop, which she would notice because they are so heavy.
6. Under cross-examination she was also asked whether one of her hands was holding her shopping at the time when she held onto the handles of the Chair to push herself up. She said “No”. She was not holding her shopping with her hands.
7. Madam Chan gave evidence related to the manner in which the Plaintiff stood up. She demonstrated that the Plaintiff held the handles of the Chair at a point further to the front of the Chair and hence it was not at the location of the handles, which the Plaintiff said she held onto to get up. The location of the handles that Madam Chan held onto was more like the location that the Defendant’s Counsel alleged. The Defendant’s Counsel alleged that the Plaintiff must have held onto the handles so much closer to the front close to the top of the legs where pressure applied from on top would cause the Chair to slide back. When this was put to the Plaintiff during cross-examination, the Plaintiff denied that she held to that location of the handles.
8. In the course of the trial, a chair similar to the one which the Plaintiff sat on and similar to one shown in the photograph at the right of page 152 was exhibited and marked Exh D1. On the 2nd day of the trial before final submissions, Exh D1 was taken out to the lift lobby of the 10tth Floor of the District Court by the Defendant’s instructing solicitors. The flooring of the lift lobby is of a type of polished stone but may not be marble. It was agreed that I should conduct a demonstration using Exh P1 to try out its weight and to see whether it would slip on the floor if downward pressure was applied to the top of the handles of the chair where the Plaintiff stated that she held onto when she got up from the Chair to see whether Exh D1 would slip on the floor surface.
9. In the demonstration, I applied pressure and weight from the top of the handles of the chair at the location where the Plaintiff said she had applied her weight, namely close to the vertical bars between the seat of the Chair and the top of the handles, (please see the photos at page 152). The chair, namely Exh D1 slipped backwards when I did that.
10. The Defendant’s Counsel conceded that the chair, namely Exh D1, did slip, when weight is applied at the top of the handles from the top down, in the location where the Plaintiff stated she placed her hands, when the chair was placed on the polished stone floor.
11. I have to find whether I accept the Plaintiff’s evidence that she held onto the handles of the Chair at the location, as between the vertical metal bars between the seat of the Chair and the handles when she pushed herself up on her legs to stand up and before she was in an upright position. I accept her evidence that she did hold the handles of the Chair in the location of the handles as stated by her. I also accept her evidence that she was not holding her shopping with her hands at the time when she tried to get up from the Chair in the manner she stated.
12. Defence Counsel suggested to the Plaintiff that she must have held the handles at the front of the handles of the Chair almost on the top of the angle between the handles and the legs of the Chair (see the photograph of the chairs at page 152). I find that could not have been the case as it would be an unnatural and awkward position to hold onto in applying weight on the handle to push oneself up from the Chair. I find also that the location in the handles where the Plaintiff was supposed to have held the handles of the Chair in the demonstration by Madam Chan is also an unnatural location where someone needing to find support from the handles of the Chair in getting up would hold. Madam Chan in her demonstration placed her hands on the handles in the front of the front vertical bar that is between the seat of the Chair and the handles. I accept the Plaintiff’s evidence as against Madam Chan’s evidence on this where the two differ.
13. The Defendant’s Counsel submitted that if the Chair was unsuitable for the polished marble floor why is it that the Plaintiff’s friend Chan Suet Wah did not have the same experience when she got off from her chair and why is it there were not more reported incidents of such accidents. As regards this, one must realize that the Plaintiff is elderly and probably in getting up she applied a lot of weight to the handles of the Chair to seek support from that to stand up. Younger or stronger people using such Chairs may not need to do that. Madam Chan though of a similar age may not have needed to apply force on the handles of her chair when she stood up.
14. I therefore find that the Chair which was of light aluminium alloy frame could easily slip on a polished marble floor of the IFC II Mall as shown in the photograph at page 148, if weight was applied on the top of the handles at the location of the vertical bars to assist oneself from getting up onto a standing position. I find that the Chair was unsuitable to be placed on the polished marble floor and that the Defendant had failed to provide a chair for the Plaintiff’s use, which was suitable and safe for the polished marble floor. I also find that the Defendant had exposed the Plaintiff to a danger or a foreseeable risk of injury and failed to warn or advise the Plaintiff that the Chair was unsuitable for the polished marble floor and the polished marble floor could be slippery. The Defendant was the one who carried on the business of the Restaurant and was Occupier of the common/open area immediately outside the Shop at the IFC Mall where the Plaintiff had the accident. The Defendant had a licence to use that common area but was not the exclusive licensee to use that common area. The Defendant had the common duty of care to ensure that the chairs used by it were suitable for the polished marble floor and that it should not expose its customers to a danger or a foreseeable risk of injury and to warn its customers of such risks. The Defendant had breached its common duty of care and was negligent.

The 2nd Issue

1. The Defendant’s Counsel in cross-examination sought to ask whether the Plaintiff was using one hand to hold the shopping as she got up on from the Chair and the Plaintiff denied this. There is no evidence that she did this and I accept the Plaintiff’s evidence that she did not do so for it would have been a most unnatural and awkward thing to do. This was not part of the Defendant’s pleaded case on the Plaintiff’s contributory negligence.
2. The Defendant’s pleaded case of the particulars of contributory negligence in paragraph 5 (a) to (e) of the Amended Defence is that the Plaintiff failed to use the Chair properly, she sat on the edge of the Chair, she failed to stand up with sufficient physical strength, she failed to keep her balance on standing up, and she had physical weakness due to Achilles tendon rupture of her right ankle and/or other pre-existing physical problems.
3. The Defendant’s Counsel stated that as the Plaintiff said she was not struck in the back by the chair as she fell, the Chair must have slid backwards horizontally, for otherwise she would have been struck by it when she fell backwards on to her buttocks. The only way in which the Chair would have slid backwards would have been if she placed her hands on the front part of the Chair. Having just lifted her body off the Chair, the Chair moved backwards quite quickly, and her hands probably slipped. The Defendant’s Counsel sought to establish that the Plaintiff had held onto the handles of the Chair in the front part of the handles and when she got up she pushed the Chair backwards by holding that part of the handles and applying force to them at diagonally.
4. The Defendant’s Counsel submitted in the alternative that if her hands were put on the top part of the handles by the weight of her body, the Chair would have tilted forward. She would have been hit by the Chair as she fell on her buttocks or she would have fallen forward and landed on her knees.
5. The Plaintiff’s Counsel submitted that for a person to stand up from a seated position on the Chair, it would be necessary for him to lift the buttocks off the chair, extend his legs to a vertical position to the floor, while at the same time transferring his center of gravity or weight towards the place where the legs are. That would involve a forward transfer of weight. If that person had been holding on to the handles in the location that the Plaintiff indicated, during the process of forward transfer of weight, and before the person has transferred the whole weight of his body to his legs, the hands would be at the back of the person and not directly to the side as in the seated position. Accompanied with force being exerted onto the handles, which is necessary in order to assist the person to stand up, the force would be in a diagonally downward direction towards the back of the chair. If the legs of the chair do not have sufficient grip to the ground, the chair would slip horizontally over the floor.
6. I find the Plaintiff’s Counsel’s submission of how the Chair could have slipped to be a sensible explanation and I accept that it is a likely scenario of what happened when the Plaintiff stood up and the Chair slipped backwards horizontally causing the Plaintiff to land on the floor. Further, in the demonstration conducted by me on Exh. D1 which was similar to the Chair, Exh. D1 slipped backwards even when downward weight was applied to the top of the handles as stated earlier in this Judgment. The bottom of the legs of Exh. D1 had hard white plastic caps and they were apparently not of substance that would enable the chair to have a grip on the floor.
7. In respect of the Defendant’s pleaded case of contributory negligence, there is no evidence that the Plaintiff sat on the edge of the Chair, or that she failed to stand up with sufficient physical strength, or that she failed to keep her balance on standing up or that she had physical weakness due to Achilles tendon rupture of her right ankle and/or other pre-existing physical problem. The only particular of contributory negligence pleaded by the Defendant that I have to consider is whether the Plaintiff failed to use the Chair properly. I have found that the Plaintiff had held onto the top of the handles of the Chair and I accepted the scenario of how the fall occurred as submitted by the Plaintiff’s Counsel. Could the Plaintiff have avoided the accident if she was mindful of the light weight of the Chair which was on polished marble floor? Defendant’s Counsel suggested that since the Plaintiff’s friend Madam Chan did not slip when getting up, the Plaintiff might have been able to avoid the slip of the Chair when she got up if she took greater care.
8. I am of the view that even were the Plaintiff to take care, the slip of the Chair on the marble floor may not have been avoided. Even if she held onto the handles of the Chair with care, consciously aware of the light weight of the Chair, the Chair was still likely to slip. At most the percentage of contributory negligence if any could not have been more than 10%. I find the Plaintiff’s contributory negligence at 10%.

The 3rd Issue

PSLA

1. It is not in dispute that during the accident, the Plaintiff sustained a fall landing on her buttocks on marble floor. She felt great pain after the accident then she was taken by ambulance to Canossa Hospital. At the hospital, she was examined by Dr. Arthur Yau. X-ray revealed that the right pubic rami sustained a fracture. Further X-ray revealed that besides the fracture of right pubic rami there was also a fracture of the right ilium and both fractures healed up with mild deformity. The Plaintiff was hospitalized in Canossa Hospital for 6 days and was discharged on 1st June 2004. She required bed rest at home until November 2004 and according to her evidence she began to walk with crutches at home four months after the accident. In the first two months she could not get out of bed at all. She had to employ night and interim caretakers to take care of her daily needs during bed-rest period. She took physiotherapy and body massage to relieve her of pain. She also used a wheelchair for a period of time and used a walking frame. She now uses a stick to assist her when walking outside her home. In her witness statement dated 8th September 2005. which was adduced into evidence, she stated that as a consequence of the accident she feels uncomfortable and painful if she changed her posture from sitting to standing up or if she sat or stood for more than 15 minutes. She feels pain in her pelvic area when she made any body movement from time to time and especially when the weather changes.
2. It was raised in the cross-examination of the Plaintiff by the Defendant’s Counsel that the Plaintiff had failed to disclose to the medical experts in the joint examination that she suffered from osteoporosis. However, it is clear that both medical experts had seen x-rays of the Plaintiff. It is clear that the condition of osteoporosis can be seen from x-ray photos and experts in this field when conducting examination of a patient of the age of the Plaintiff must have osteoporosis in mind as a possible pre-existing condition of the patient because this is a common condition of elderly women. I accept the submission of the Plaintiff’s Counsel that although it is not expressly stated in Dr. Chan’s opinion that the Plaintiff had this pre-existing condition, it is likely to have been in the background of his thinking when formulating his opinion. The Joint Medical Assessment Report by Dr. Chun also revealed that the Plaintiff had osteoporosis.
3. In the joint medical examination by the Plaintiff’s medical expert Dr. Chan Chi King and the Defendant’s medical expert Dr. Chun Siu Yeung, Dr. Chan reports that the Plaintiff complains of residual right-sided low back pain with right hip pain and weakness rendering it necessary for her to walk with a stick. As regards whether the low back pain is a consequent of the injuries from the fall, the Defendant’s medical expert, Dr. Chun Siu Yeung’s view is of the view that as there was no report from Dr. Arthur Yau, the treating specialist doctor, that the Plaintiff had low back pain after the fall, therefore it is not related to the fall. He stated that a woman of the age of the Plaintiff, who was 72 years on the date of the accident, who had osteoporosis before the accident, the low back pain could be due to age and osteoporosis or other factors other than from injury caused by the accident as low back pain is common in the general population.
4. Both medical experts recorded that she has right hip pain with tenderness over anterior aspect. There was a slight decrease of right hip movement. To the medical experts she reported that she has on and off low back pain with left sided muscle tightness. Back pain increases on prolonged walking, standing and sitting more than 30 minutes. She suffers right hip pain on walking more than 30 minutes. She needs a stick when going out.
5. Physical examination showed that she walked with a normal gait. The right leg single stance was less stable than the left leg single stance. She could squat fully but could not get up by herself.
6. In considering the medical experts’ evidence, I accept that it is common for elderly people to have low back pain. This is particularly so for people with osteoporosis. However, it could not be disputed that such propensity for low back pain could be made worse by an accident with a resultant residual right hip pain even though the right hip pain is mild and only comes on from time to time. It is a matter of common sense that one area of pain could cause muscle tension that could have an effect on other areas of the body, which could be susceptible to pain. I therefore find that to an extent the residual pain in the right hip and residual pain from the injury arising from the accident could heighten the intensity or frequency of low back pain. To this extent there is a causal connection between the residual pain from the injuries arising from the accident and the frequency and/or intensity of the low back pain suffered by the Plaintiff.
7. The Defendant’s witness Mr. Chan Chi Man sought to say that he saw the Plaintiff walk into the open area of the Restaurant with the aid of a walking stick. The Plaintiff and her witness Madam Chan Suet Wah denied that. Mr. Chan Chi Man also stated in evidence that the Plaintiff was not carrying shopping bags when she walked into the common/open area of the Restaurant. Both the Plaintiff and Madam Chan Suet Wah stated that the Plaintiff was carrying shopping bags. Therefore, I do not accept Mr. Chan Chi Man’s evidence where it is disputed by the Plaintiff and Madam Chan as I believe that his memory of the event could not have been so clear. It is the Plaintiff’s evidence that arising from the injuries caused by the accident, she now uses a stick to help her when walking.
8. The Plaintiff’s Counsel advanced two cases in support of her submission that PSLA should be in the region of $250,000.00 to $300,000.00 and admitted that the Plaintiff’s injuries are not in the serious category. These are:

(1) 徐偉金 v 鄒吉祥, HCPI 383/2000, where the Plaintiff suffered left hip injury and hip fracture. He was hospitalized for 21 days and had six months’ sick leave, and was in wheelchair for 1 month after discharge from hospital. He could resume his pre-accident work and cannot enjoy previous activities. Experiences pain with weather changes. He suffers from 2% permanent incapacity. The award made for PSLA was $220,000.

(2) Yeung Lai Hung v Ng Bing trading as Sun Fat Restaurant, HCPI 106/2001, where the award for PSLA was $130,000. The Plaintiff suffered from a soft tissue back injury from which she had fully recovered, requiring no further treatment. The learned Judge found that there was only slight lost of lordosis curvature in C5 and C6 sections of the spine. The learned Judge found that she exaggerated her pain symptoms. Nevertheless awarded $130,000 for PSLA.

1. Having regard to the aforesaid two authorities, I am of the view that PSLA in the sum of $180,000.00 is appropriate for the Plaintiff.

Special Damages

1. The Plaintiff claims hospital expenses at $40,090.00. This is proved in the hospital bill at page 141 Section D of BD for this amount and I great this.
2. Apart from that the Plaintiff claims expenses of an interim night helper at $4,000.00, standby medical staff at $2,000.00. There are no receipts for these and no evidence was led in relation to these expenses. I am not able to award these. In relation to the claim for western medicine in the sum of $500.00 there is no receipt for this. There is a receipt for consultation in the sum of $500.00 at page 146 of the Section D of BD but no evidence was led in relation to this. There is however no pleading related to this. I am not able to award this.
3. There is a claim for Chinese medicine in the sum of $7,000.00. There is no evidence of this and I cannot award that. She claims physiotherapy in the sum of HK$25,000, but there is no receipts for this, nor is there any details as regards the number of sessions nor the amount each session. I do accept her evidence that she had physiotherapy. As there are no particulars or no receipts, I give her a nominal sum for this in the sum of $2,000.00.
4. There is an item for hiring of car and transportation during the injured period at $90,000.00. In evidence the Plaintiff stated that she gave her sister $30,000.00 per month for three months for the use of her car and driver. However she admitted that she did not need to have a hired car with driver as she could avail herself of the use of a taxi. I shall award nominal charges for taxi fares in the sum of $500.00 per month for three months at $1,500 in total.
5. The items of special damages awarded by me amount to $40,090.00 + $2,000.00 + $1,500.00.= $43,640.00. Total damages is assessed at $223,640.00 and I deduct 10% for contributory negligence making a sum of $201,276.00.
6. Judgment for the Plaintiff in the sum of $201,276.00 together with interest on $162,000.00 being PSLA at 2% per annum from the date of Writ to date of judgment and on $39,276.00 from date of accident to date of judgment at half judgment rate and thereafter on the Judgment sum

at Judgment rate until payment. I grant an Order Nisi for costs of the action to the Plaintiff to be paid by the Defendant to be taxed if not agreed， Certificate for Counsel.

( C. B. Chan )

District Judge

Representation :

Miss Peony Wong instructed by Messrs. S.H. Leung for the Plaintiff.

Mr. Nicholas Pirie instructed by Messrs. Hon & Co. for the Defendant.