# DCPI1025/2004

## IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1025 OF 2004

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### BETWEEN

CHAN KUN, a patient by

HO SHU CHUEN, her next friend Plaintiff

and

TSUEN WAN NEW CAMBRIDGE

NURSING HOME LIMITED 1st Defendant

CAMBRIDGE NURSING HOME

MANAGEMENT CO. LIMITED 2nd Defendant

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Coram: Deputy District Judge W. K. Kwok in Court.

Date of Hearing: 12th, 13th and 14th September 2005.

Date of Handing Down Judgment: 21st January 2006.

#### JUDGMENT

1. The Plaintiff, now aged 84, a patient in the rehabilitation unit of Kowloon Hospital and suing by her son and next friend, is claiming for damages for personal injuries caused to her on 26th July 2002 while she was a resident in a nursing home in Sai Lau Kok Road, Tsuen Wan (“the Nursing Home”) operated by the 1st Defendant (“D1”) which was at the material times the holder of a residential care home licence within the meaning of the Residential Care Homes (Elderly Persons) Ordinance, Chapter 459, Laws of Hong Kong.

2. The Plaintiff also brings this action against 2nd Defendant (“D2”). D2 is alleged to be the managing company of the Cambridge Nursing Home Group in which D1 is alleged to be a member. However, Mr. Neal Clough, Counsel for the Plaintiff, informs me in his closing speech that the Plaintiff will not pursue her claim against D2 after the defence witness has testified on the corporate hierarchy of D1 and D2. Mr. Clough accepts that D1 and D2 are separate legal entities, and that D2 will not be vicariously responsible for any liability on the part of D1.

3. Hence, I am only concerned with the Plaintiff’s claim against D1.

Background

4. The medical history and health condition of the Plaintiff have been helpfully summarized in the joint medical report dated 22nd May 2004 and prepared by Dr. Lau Hoi Kuen and Dr. Danny Tsoi Chi Wah, who were appointed by the Plaintiff and the Defendant respectively.

5. According to the joint medical report, the Plaintiff had three episodes of cerebrovascular accident in 1993, 1998 and 1999. The last episode occurred on 10th August 1999 when she was admitted into the Princess Margaret Hospital. After she had completed a program of rehabilitation and physiotherapy in the hospital, she was discharged directly into the Nursing Home on 12th November 1999. At that time, the Plaintiff was unable to speak, although she could smile and make simple responses to her relatives. She had been dependent on others for her personal care including cleansing, bathing, putting on clothes and feeding.

6. The Plaintiff’s health then deteriorated slowly and gradually. By early 2002, she could no longer walk but was staying in bed most of the time though she could sit up in the bed or in the wheelchair at times. She had poor response to external stimuli such as words spoken by her son and relatives. She had contracture of her 4 limbs in spite of maintenance exercises.

7. Because of her prolonged stay in bed and the contracture of her limbs giving rise to pressure points, the Plaintiff had bedsores over her limbs. On 13th June 2002, the Plaintiff was admitted to the Department of Orthopaedics & Traumatology of Yan Chai Hospital for cellulitis of her left leg and bedsores over the left toe and heel. She was discharged on 17th June 2002 back to the Nursing Home. After her discharge from hospital, the community nursing staff of the Hospital Authority attended the Nursing Home to dress her sores.

8. According to the records kept by the Nursing Home, the Plaintiff was a resident who required “special personal care”. It was evident from the daily records in pages 4 and 5 of Part V of the Trial Bundle that the Plaintiff was fed via stomach tube between 29th June 2002 and 19th July 2002, and from the daily records in pages 6 and 7 of the same Part of the Bundle that her body was turned to rest in different positions at different hours of the day, sometimes with her body resting on her left, sometimes on her right, and sometimes lying flat, apparently as a measure to avoid bed sores being caused to the Plaintiff. She was also put on diapers to prevent her from soiling her clothes and bed, and her diapers had to be changed from time to time.

9. On 26th July 2002, the Plaintiff’s daughter Madam Ho Yuk Lan (PW1) visited the Plaintiff at about 4 p.m. When PW1 was cleaning the Plaintiff and was trying to change diaper for her, she found that the Plaintiff’s right leg was dangling, and that her facial expression showed that she was having severe pain. The Plaintiff was then sent to the Department of Orthopaedics & Traumatology of Yan Chai Hospital for examination. She was found to have sustained right femur fracture with the bone being osteoporotic, as well as sores over her back, right elbow and right foot. She was treated conservatively for the fracture.

10. The Plaintiff stayed in Yan Chai Hospital until March 2003 when she was transferred to Caritas Medical Centre due to the outbreak of atypical pneumonia. In June 2003, she was transferred to Kowloon Hospital, and she is now staying in the rehabilitation unit of the Hospital.

The basis of the Plaintiff’s Claim

11. The Plaintiff originally framed her claim on the basis of negligence, breach of statutory duty under the Occupiers Liability Ordinance, Chapter 314 as well as under the Residential Care Homes (Elderly Persons) Regulations, Cap 459, and breach of contract.

12. In his closing speech, Mr. Clough confirms that the Plaintiff will not rely on breach of statutory duty as a basis for her claim.

13. As far as her claim based on negligence is concerned, it is clear from the amendment made by the Plaintiff to the Statement of Claim pursuant to the Order made by Her Honour Judge C. B. Chan on 11th April 2005 that she is no longer relying on the maxim of *res ipsa* *loquitor* to prove her case.

14. It is not necessary to set out in this judgment all the alleged particulars of negligence and of breach of contract on the part of D1 relied upon by the Plaintiff. It is because, as pointed out in the written opening of Mr. Clough, there is only one factual issue in this case, namely, has the Plaintiff established, the onus being on her, that the fracture of her right femur was the consequence of any act or omission of D1? If she discharges the burden of proof on balance of probabilities, she will succeed in her claim in both negligence and breach of contract. However, if she fails, her claim will likewise fail under both limbs.

Witnesses in Court

15. There are only two witnesses for the Plaintiff, namely, her daughter Miss Ho Yuk Lan (PW1) and her son and next friend Mr. Ho Shu Chuen (PW2). The Plaintiff is paraplegic and unable to speak. She was unable to describe to any of her attending doctors how she sustained the right femur fracture. She has not been called to testify at the trial.

16. PW1 testifies that on 26th July 2002, she reached the Nursing Home just before 4 p.m. When she first went into the room, she saw that the upper body of the Plaintiff had been raised and was being supported by a couple of additional pillows underneath her head, neck and back. She also noticed that the Plaintiff’s eyes were wide open, her face was red and she was making some noises. PW1 considered that this was unusual because the Plaintiff was sitting in a very straight position when she was normally lying almost flat in bed, and her face was normally not red. PW1 also found the Plaintiff’s eyes a bit wet as if she were crying, but at that time PW1 thought that the Plaintiff was just somewhat excited since she had not visited her the day before. Though the Plaintiff had made some noises, PW1 did not know what she wanted to tell her.

17. According to PW1, she then started her normal cleaning routine on the Plaintiff. After she had cleaned her face and mouth as usual, a nurse whom she had never met before came in and spoke to her. She told PW1 that the Plaintiff had already been bathed that morning and that her diaper had just been changed so that it would not be necessary to do it again. PW1 then intended to take away the cleansing water, but when she was about to do so, the Plaintiff kept on making noises and staring at her. PW1 thought the Plaintiff might have soiled her diaper again. She wanted to check it out. She therefore removed a pillow underneath the Plaintiff’s head so as to make her lie down a bit more, took away the quilt covering her, and lowered her trousers. PW1 then noticed that the Plaintiff’s right knee was pointing effortless away from her body, and that her right thigh was red and denting inward like a “V”. PW1 stated that she immediately sensed something had gone wrong with the Plaintiff’s right leg since her legs used to be positioned tightly against each other due to the wasting of her leg muscles.

18. PW1 said she then tried to seek help from Mr. Yip, the person-in-charge of D1 (“Mr. Yip”). However, Mr. Yip said he was busy. He only sent his staff Miss Sin (“Miss Sin”) to look into the matter. Miss Sin then asked a registered nurse Miss Tso (“Miss Tso”) to accompany her to examine the Plaintiff. PW1 stated that Miss Tso took only a brief look at the Plaintiff before she said that there was nothing wrong with the Plaintiff and that there was no sign of fracture in her right leg. PW1 felt unsatisfied. She complained again to Mr. Yip, but Mr. Yip only called for an ambulance upon her insistence. PW1 said that she felt that none of the staff at the Nursing Home showed any concern to the Plaintiff.

19. PW2 is the second son of the Plaintiff. He said that he was satisfied with the service provided by the Nursing Home in the first two years of the Plaintiff’s admission, but the service deteriorated since mid-2001 when there was a change in the management of the Nursing Home. He found it difficult to obtain assistance from the staff. Between the middle and the end of 2001, he made complaints to Miss Sin orally whenever he paid the Plaintiff’s monthly fees. He stopped making complaints in early 2002 only because the Plaintiff was frequently admitted into Yan Chai Hospital.

20. PW2 further testifies that about 5 p.m. on 26th July 2002, he received a call from PW1 that the Plaintiff had to be sent to hospital at once. Since PW1 had not given him any further detail, he went directly to the Nursing Home. When he arrived, the Plaintiff had already been sent to Yan Chai Hospital by ambulance. However, nobody in the Nursing Home told him the reason why the Plaintiff was sent there. He went to the Hospital where he met PW1. The attending doctor later told them that the Plaintiff’s right femur had been fractured.

21. On the following day the 27th July 2002, PW2 together with his family members had a meeting with Mr. Yip, Miss Sin and Miss Tso. PW2 said that Mr. Yip had promised him during the meeting that he would investigate the accident and provide him with a written explanation in 3 days, but the explanation was never forthcoming.

22. Another meeting was held on 30th July 2002 between PW2, his wife, Miss Luk (DW1), Mr. Yip, Miss Tso and Miss Chow who had been a management staff of the Nursing Home since January 2002 (“Miss Chow”) in the office of D2 in Mongkok.

23. PW2 testifies that during this meeting, Miss Tso and Miss Chow admitted that the Nursing Home was negligent in not knowing the happening of the accident, but insisted that no staff of the Nursing Home should be held responsible for the accident. None of them told him anything about the outcome of the investigation carried out by D1 or D2, but Miss Luk, Miss Tso and Mr. Yip kept on persuading him to make arrangement for Mr. Yip to meet the Plaintiff’s attending doctors. PW2 however considered their request unreasonable and rejected them. He also rejected DW1’s offer to provide physiotherapy for the Plaintiff during her admission in hospital because, according to PW2, he was only concerned with the actual cause of the accident.

24. PW2 maintained that he had never received any written explanation from either D1 or D2 concerning the injuries to the Plaintiff. He therefore wrote to D2 on 22nd August 2002 and claimed for damages. D2 replied to him by a letter dated 27th August 2002 in which PW2 says the defendants had made unfounded allegations against him and his brothers, the details of which are not material to this judgment. PW2 then complained against D1 by a letter dated 6th September 2002 to the licensing section for nursing homes of the Social Welfare Department as well as to district board member Mr. Chan Wai Yip.

25. PW2 filed a claim on 17th October 2002 against D1 in the Small Claims Tribunal. It is again not necessary to go into details of these proceedings and their outcome, save to recite the evidence of PW2 that he had discovered during the course of those proceedings that D2 had written to Yan Chai Hospital by a letter dated 10th August 2002 without the consent of the Plaintiff or any of her family members to persuade the doctors that the Plaintiff’s fracture was caused by her severe osteoporosis.

26. PW2 further testifies that he finds the standard of care of the Nursing Home unsatisfactory. He points out that the Plaintiff had regularly suffered from bedsores, and the condition of her bedsores was so serious that she had to be admitted into Yan Chai Hospital for treatment in June 2002 for over a month before the incident on 23rd July.

27. Under cross-examination, PW2 agrees that D2’s letter dated 27th August 2002 was about the Plaintiff’s fracture, but he considers that it was not the kind of report he had asked for. It is put to him that he had never made any oral complaints to Miss Sin or anyone in D1, and PW2 denied. He accepts that he had not mentioned such complaints in his witness statement, but he says that he has no responsibility to do so.

28. Miss Luk Ngan Ling Irene (DW1) is the only witness for D1. She is a director of both D1 and D2. She has 18 years’ experience in operating and managing nursing home, and was at the material times responsible for the management and daily operation of 21 nursing homes including D1. DW1 maintains that D1 has set a very high standard in respect of staff and provision of service. In or April 2002, D1 had applied for ISO 9001 Certificate, and the date when the Plaintiff sustained fracture to her right femur happened to be the day when the ISO 9001’s auditor, AJA Registrars Limited, carried out the actual on-site physical inspection and/or examination of the premises in respect of D1’s application. D1 succeeded in this application, and the ISO 9001 Certificate was granted on 19th August 2002. She produces a copy of the Registration Certificate to support her evidence.

29. On the number of staff working in D1 on 26th July 2002, DW1 testifies that 19 staffs were on the day-shift duty that day, though the Social Welfare Department only required it to have 13 staff to take care of the 105 elderly persons present that day. She produces D1’s duty roster for July 2002 (page 82 of Part V of the Trial Bundle) as supporting evidence that showed that a total of 21 staff members had been on duty on 26th July 2002 to handle the two shifts. The roster also showed that the number of staff members had been ranging from 17 to 21 on different days in the whole of July 2002. DW1 accepts that officers from the licensing department of nursing homes of Social Welfare Department had checked D1’s premises on 14th September 2002 when the officers found the number of staff inadequate and the hygiene was not satisfactory. DW1 explained that the officers visited D1 at about 8:15 a.m. when some staffs were late for work, and the bad smell was caused by many residents changing their soiled diapers around the same time, and there was also a resident who never went to toilet but excreted anywhere he or she liked.

30. DW1 confirms that the Plaintiff was a resident who required special care because she was paralyzed and bedridden after she had suffered from several strokes. DW1 did not look after the Plaintiff personally, but she produces D1’s records pertaining to the care and attention provided to the Plaintiff. Firstly, DW1 produces D1’s stomach tube-feeding records in respect of the Plaintiff between 29th June 2002 and 26th July 2002 (pages 4 and 5 of Part V of the Trial Bundle). It is apparent that the Plaintiff could not eat by herself and had to be fed with milk and water through stomach tubes. The records showed that she was fed 5 times a day via stomach tube at fixed hours. On 26th July 2002 before admission into Yan Chai Hospital, she was fed at 6 a.m., 10 a.m. and 2 p.m. with 250 ml. of milk and 50 ml. of water on each occasion.

31. Secondly, DW1 produces D1’s special personal care records in respect of the Plaintiff between 1st June 2002 and 26th July 2002 (pages 6 and 7 of Part V of the Trial Bundle). DW1 explains that since the Plaintiff could not move by herself and was suffering from severe contracture of her limbs, her body had to be turned from time to time to avoid bedsores. According to the entries on 26th July 2002, the Plaintiff was turned to rest on the left side of her body between 8 a.m. and 10 a.m. She was then turned to rest on her right between 10 a.m. and 12 noon. No entry was made for the period between 12 noon and 2 p.m. She was turned to rest on her right again between 2 p.m. and 4 p.m. The entry thereafter showed that the Plaintiff had been sent to Hospital. The entries also showed that the Plaintiff had not defecated, presumably on the diaper, on that day before she was taken to Hospital.

32. DW2 denies that PW2 had made any oral complaints to her. She also says that she had made enquiry with Miss Sin who told her that PW2 had never made any oral complaint to her.

33. As to the cause of the Plaintiff’s fracture to her right femur, DW1 says that she has been managing nursing homes for elderly for almost 18 years and has seen many cases similar to that of the Plaintiff. She says that since the Plaintiff had osteoporotic bones, minor and/or insignificant movement of her body could cause the fracture.

34. Under cross-examination, DW1 testifies that she had been notified of the Plaintiff’s injury on 26th July 2002. She then asked those who had actually taken care of the Plaintiff to submit written reports regarding what had happened at the material times to her.

35. As far as her investigation of the incident on 26th July 2002 was concerned, DW1 testifies that she had received 4 reports. They were written by Miss Liu Sun Kwan, Miss Tong Yan Wing, Miss Poon Kwai Chung and Miss Yu Ngar Ying (pages 91, 92, 93 and 94 respectively of Part V of the Trial Bundle). Miss Liu Sun Kwan and Miss Tong Yan Wing were employed as “charge hands”, while Miss Yu Ngar Ying was a health care worker supervising the charge hands. In addition to the written reports, DW1 had also asked the Plaintiff’s family members, Mr. Yip and Miss Chow to go to her office to tell her what had happened.

36. DW1 denies that during the meeting on 30th July 2002, Miss Tso and Miss Chow had admitted to PW2 that the Nursing Home was negligent in knowing the happening of the accident. She maintains that she had told the family members of the Plaintiff of 4 written reports received by her. She agrees that she had received no written report from Mr. Yip but she considered it unnecessary. DW1 denies that she had completed her enquiry into the incident after she had received the 4 written reports. She testifies that she wanted to ask the Plaintiff’s doctors the cause of the bone fracture and that she considered this was the most important enquiry to be made. Hence, she asked the Plaintiff’s family during the meeting to cooperate with D1 so that they should see the doctors together. However, the Plaintiff’s son rejected her request right away. DW1 said she pointed out to the Plaintiff’s son at once that asking doctors was the way to know why the Plaintiff had sustained the fracture, and she asked him why he refused her request. DW1 therefore says that she suspected that on that day the Plaintiff’s family had already been aware of the Plaintiff’s disease.

37. Subsequent to the meeting, by a letter dated 10th August 2002 (page 44 of Part V of the Trial Bundle), D1 wrote to Yan Chai Hospital and asked the doctors to tell them the reasons why the Plaintiff had sustained the fracture to her right femur. D1 receive a reply dated 13th September 2002 (page 45 of Part V of the Trial Bundle) from the Hospital in which D1 was not given a clear answer. At that stage, DW1 had not yet had concrete knowledge that the Plaintiff was suffering from extreme osteoporosis.

##### Written statements and documentary evidence

38. The parties have agreed upon the Trial Bundle. D1 had also by a Notice filed on 17th June 2004 given its intention to adduce as hearsay evidence 56 items of statements and documents particularized in the Notice pursuant to section 47A(2) of the Evidence Ordinance. The reports made by Miss Liu Sun Kwan, Miss Tong Yan Wing, Miss Poon Kwai Chung and Miss Yu Ngar Ying were included in this Notice. The Plaintiff has not applied, pursuant to section 48 of the same Ordinance, for any one of them to be called as a witness and to be cross-examined.

39. I have considered all statements and documents. It has to put on record that the trial is conducted in English, obviously because Mr. Clough cannot use Chinese or Punti, but statements and documents had not been accompanied by a certified translation or a translation in English at all. The parties are contented to proceed without the translations, and for documents that they cannot agree upon the translations, they provide their own English translations for my consideration. Bearing in mind that I can read and understand Chinese, the parties are happy that I can read the statements and documents and decide which version of English translations to accept after hearing submissions from them.

40. Miss Poon Kwai Chung’s report dated 29th June 2002 stated that she was responsible for bathing the Plaintiff at 7:40 a.m. on 26th July 2002. She took her out from the bathroom and handed her to a nurse to help her put on clothes. Miss Poon confirmed that while the Plaintiff was being bathed, she had not fallen and there was no bumping against her.

41. The parties cannot agree upon the English translations for Miss Liu Sun Kwan’s report dated 28th July 2002. Miss Liu Sun Kwan stated that at 7:30 a.m. on 26th July 2002, she and Miss Tong Yan Wing lifted the Plaintiff onto her bed after she had been bathed and clothed. She was lifting the lower part of the Plaintiff’s body while Miss Tong Yan Wing was lifting her upper part, and they carefully put her onto the bed. She said that the Plaintiff had not bumped into any hard objects. At 8 a.m., she put the diaper on the Plaintiff’s bed. She told Miss Tong Yan Wing that the Plaintiff’s legs were held together very tightly. Then, according to Miss Liu Sun Kwan, “之後唐姑娘用力把她的雙腳分開進片” which is translated by D1 as “Then, Miss Tong used force to separate her legs so that the diaper could be put on her”, and by the Plaintiff as “Next Miss Tong forced her leg apart to change the diaper”. Then, Miss Liu Sun Kwan and Miss Tong Wing Yan put the Plaintiff’s legs properly on the bed and covered her with blanket before they left.

42. Miss Liu Sun Kwan’s version was corroborated by Miss Tong Yan Wing who stated in her report dated 29th July 2002 that at about 8:45 a.m. she and Miss Liu Sun Kwan together changed diaper for the Plaintiff. There was no collision, no falling off and nothing unusual was observed.

43. Miss Liu Sun Kwan also reported that she changed diapers for the Plaintiff at 11:15 a.m. and 2 p.m. on the same day. On both occasions, she saw that the Plaintiff’s arms and legs were held together very tightly, and that her legs had not moved.

44. Miss Yu Ngar Ying’s reported dated 29th July 2002 stated that at about 3 p.m. on 26th July 2002, she patrolled to Bed A5 and noticed that the Plaintiff was lying on her right side. She noticed that her sleeping posture was too low. She therefore asked Liu Sun Kwan and Wong Siu Ling to come into the room and told them that the Plaintiff’s sleeping posture had problem. She then held the shoulders of the Plaintiff while Liu Sun Kwan held her lower body, and together they lifted her up and moved her a little bit in the direction of the headboard of the bed. They then put pillow underneath her head and right shoulder. They did not notice anything wrong with the Plaintiff. The event referred to by Miss Yu in her statement was also referred to by Miss Liu Sun Kwan who gave a similar version.

45. In a statement signed by Mr. Yip (page 97 of Part V of the Trial Bundle), he stated that at about 10 a.m. on 26th July 2002, the community nurse Miss Tong came to the Nursing Home to clean the wound of the Plaintiff and during the whole course of cleaning the wound, Miss Tong did not find anything unusual about the Plaintiff. Mr. Yip further stated that the community nurse Miss Tong had read what he had written down and agreed to what was stated there.

46. The attendance of the community nurse Miss Tong on that day was confirmed by the bill issued by the Hospital Authority claiming a charge for her attendance (page 19 of Part V of the Trial Bundle).

##### Medical evidence

47. In their joint medical report dated 22nd May 2004, Dr. Lau Hoi Kuen and Dr. Danny Tsoi Chi Wah had made the following comments: -

“(5) Concerning the likely cause of the fracture of her right femur, both Dr. Lau and Dr. Tsoi agree that the main cause should be the extremely osteoporotic bones subsequent to the prolonged stay in bed. Of course, the osteoporosis associated with old age, prominent in females after menopause, has also acted as the contributory factor. Because of the weakening in the strength of her limb bones, it was possible for the bone to fracture when the staff of the home for the aged lifted her up from the bed or even performing routine turning. On the other hand, trauma, such as a fall from the bed, cannot be excluded.

(6) The part played by the advanced degree of osteoporosis of her bones as the cause of the fracture is further supported by the fracture of her right upper tibia while she was under rehabilitation at CMC in May this year. There was no history of injury and yet she had a fracture developed even during nursing care such as turning her in bed or carrying out cleansing job. In fact, the abundant callus found in the first set of x-rays showing the tibial fracture suggests that it was quite some time after the occurrence of the fracture before the fracture was discovered.

(7) X-rays of her deformed and ankyosed right elbow reveal malunion after previous fracture. Dr. Tsoi is of the opinion that she was all along prone to fracture of her limbs even before the occurrence of the right femoral fracture. Dr. Lau would like to point out that the fracture of her right elbow was more likely to have happened a long time ago and the malunion being related to the common practice of having bonesetter treatment.”

48. After the Plaintiff had amended her Statement of Claim on 11th April 2005 in the hearing before Her Honour Judge C. B. Chan, the two doctors examined the Plaintiff again and gave their further opinion. In another joint report dated 11th July 2005, they stated that after they had reviewed the file and the revised statement of claim, they were of the opinion that: -

“… the injury, namely the right femoral fracture, is consistent with the Plaintiff’s legs being forced open. But we would like to point out that it was equally possible, because of the extremely poor bone stock, for the fracture to be caused by other nursing activity e.g. lifting her up from the bed, turning in bed or trauma like falling from the bed onto the floor.”

Liability

49. As rightly pointed out by Mr. Walker Sham, Counsel for D1, that the Plaintiff must prove, on balance of probabilities, it was D1’s negligence that caused the Plaintiff to sustain the fracture to her right femur. The correct principle of law is stated in Charlesworth & Percy on Negligence, 10th Edition, paragraph 5-13, that:

“Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the claimant. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that, on a balance of probabilities, the more likely cause of the damage was the negligence or breach of statutory duty of the defendant, his servant or agent and not solely the negligence or breach of statutory duty of some other person. If he fails to establish the defendant caused the harm of which he complains, or some part of it, then his action will fail. Such a failure will result, whether this happens to be expressed in terms of lack of causation or for reasons of remoteness.”

50. In the present case, the Plaintiff has accepted that the maxim of *res ipsa* *loquitor* has no application. In other words, the Plaintiff has accepted that this is not a case where the fracture to her right femur would not have occurred without D1’s negligence. Subsequent to this concession, the Plaintiff applied for leave, which was granted, to amend paragraph 6 of the Statement of Claim to include the following alleged particulars of negligence and breach of contractual duties: -

“(h) In the report of Liu Sun Kwan, a staff of the 1st Defendant, dated 28th July 2002, it was stated that a Miss Tong of the 1st Defendant forced the legs of the Plaintiff apart in order to change the diaper in the morning of the accident.

(i) As the Plaintiff is suffering from severe limb contractures, it was inappropriate for anyone to force her legs apart without risking the fracture of the limb bones of the Plaintiff.”

51. In his final submission, Mr. Clough confirms that the negligent act relied upon by the Plaintiff was Miss Tong Yan Wing’s forcing apart of the Plaintiff’s legs when she and Miss Liu Sun Kwan together changed the Plaintiff’s diaper at 8 a.m. on 26th July 2002.

52. The Plaintiff must therefore prove by direct or circumstantial evidence that D1 had been guilty of the alleged negligence and/or breach of contractual duties. As to the proper approach to the evidence, both Mr. Sham and Mr. Clough refer me to the case of *Lee Kin-kai, a patient by his father and next friend Li Wah v. Ocean Trampling Co. Ltd. trading as Ocean Trampling Workshop* [1991] 2 HKLR 232. The leading judgment given by Hunter J.A. was aptly summarized in the head-notes where it was stated that causation was a matter to be determined by the judge using a common sense approach, and of applying the standard of balance of probabilities to the medical evidence.

53. I adopt what Mr. Clough calls the Hunter test and accept that I have to use my common sense to determine the question of causation. I bear in mind what Mr. Justice Hunter had said in his judgment that causation was essentially a matter for the judge and was a matter upon which the judge would no doubt be assisted by the medical evidence but he was not dictated to by it.

54. The doctors appointed by either side have little dispute in their expert opinion. It is common ground that that because of the advanced degree of osteoporosis of the Plaintiff’s bones, the limb bones were so weak that it was possible for the bone to fracture during the course of any nursing activities like lifting the Plaintiff up from the bed or even performing routine turning. The doctors have not ruled out other form of trauma like falling from bed as a possible cause. That is understandable because bone fracture is basically breaking the bone by force, and if a small amount of force generated by lifting up the Plaintiff or routine turning of her body could break her right femur, a greater amount of force generated such as by a fall from the bed to the floor could of course break the bone. It is significant to note that when the two doctors were asked to review the cause of the Plaintiff’s fracture in light of the specific allegation that the fracture was caused by Miss Tong Yan Wing in forcing the Plaintiff’s legs apart to change her diaper, they are at pains to point out in their second joint report that it was equally possible for the fracture to be caused by other nursing activities like lifting the Plaintiff up from the bed or turning in bed because of “the extremely poor bone stock” of the Plaintiff.

55. Mr. Sham submits that the medical evidence clearly shows that the likely cause of the Plaintiff’s injuries was her extremely osteoporotic bones subsequent to her prolonged stay in bed, and the fact that she had another fracture of the right upper tibia for unknown reason while she was under rehabilitation in Caritas Medical Centre in May 2003 was relied upon by both doctors to support this view. I accept this submission. I understand that I am not dictated by the doctors’ expert opinion, but using my common sense to approach the question of causation, I have to bear in mind such medical evidence. So, what direct or circumstantial evidence has the Plaintiff adduced to prove her case?

56. In light of the evidence adduced, bearing in mind that the Plaintiff was bedridden and could not move by herself, I find that, on a balance of probabilities, the facture occurred in the course of one of the nursing activities performed on the Plaintiff on 26th July 2002.

57. However, as the very first hurdle to overcome in proving her case against D1, the Plaintiff has to prove that it was D1’s staff and not anyone else that performed the nursing activity that caused the fracture.

58. On the day in question before PW1 discovered the fracture, it must be right for me to point out that the nursing activities performed on the Plaintiff had been carried out not only by D1’s staff but also by PW1. It must be borne in mind that PW1 had lowered the Plaintiff’s body from what she called a very straight position to a lying position, and that she had lowered her trousers to check her diaper. These actions could have included moving or shifting the body of the Plaintiff from one position to another involving the use of force, no matter how careful PW1 was in performing the act.

59. Nevertheless, I find it more probable than not that the fracture had occurred before PW1 laid a hand on her mother. I make this finding on the basis of what PW1 describes to be the abnormal behaviour of the Plaintiff when she first saw her, i.e. the Plaintiff’s eyes were wide open and wet, her face was red, and she was making noises continuously. These symptoms indicated that she was suffering from pain caused by the fracture that had already occurred at that time.

60. The Plaintiff’s case is that Miss Tong Wing Yan had fractured the right femur of the Plaintiff when she changed diaper for her about 8 a.m. Neither PW1 nor PW2 were present when the Plaintiff’s diaper was changed at that time. What the Plaintiff is relying upon is the report dated 28th July 2002 from Miss Liu Sun Kwan. The Plaintiff refers to the passage in which Miss Liu described how she together with Miss Tong Yan Wing changed diaper for the Plaintiff. After stating that she noticed the Plaintiff’s legs were held together very tightly, Miss Liu described what Miss Tong Yan Wing had done as follows: “之後唐姑娘用力把她的雙腳分開進片”. It is the Plaintiff’s contention that Miss Tong Yan Wing had forced the Plaintiff’s legs apart and in the process fractured the right femur of the Plaintiff.

61. The parties are unable to agree upon the English translation of the above sentence in Chinese. Having read this particular sentence many times with reference to the particular context in which it appeared in the report of Miss Liu Sun Kwan and having considered parties’ submissions, I prefer the translation given by D1, which reads “Miss Tong used force to separate her legs so that the diaper could be put on.”

62. In my view, Miss Liu Sun Kwan was clearly not suggesting that Miss Tong Yan Wing was using force rashly or recklessly just for the sake of forcing open the Plaintiff’s leg for putting on the diaper. Bearing in mind that it is common ground in the evidence that the Plaintiff had been suffering from contracture in all her 4 limbs by early 2002, it must be the case that certain degree of force had to be used to separate her legs in order to change her diaper. Miss Liu Sun Kwan had not used any adjective to describe the amount of force used, and the words “用力” could only mean using force but it could not be implied with further meaning like “using force excessively” when the word was actually not there. After that particular sentence in Chinese, Miss Liu Sun Kwan described that she and Miss Tong Yan Wing put the Plaintiff’s legs properly on the bed. The whole passage indicated that Miss Liu Sun Kwan was not describing anything unusual or hurtful, and that it suggested nothing but just a normal routine job in changing diaper. Furthermore, Miss Liu Sun Kwan did not say that it was she who used the force. What she had put down in the report was no doubt just her own observation of the event, and what she could tell about the degree of force used by Miss Tong Yan Wing was merely a matter of perception. For these reasons, I find that it is very difficult for the Plaintiff to make out a case based on this sentence in Chinese alone to say that Miss Tong had used force excessive than what was required in the circumstances.

63. Furthermore, as Mr. Sham rightly pointed out, there is no evidence to prove that the fracture occurred when Miss Tong Yan Wing separated the Plaintiff’s legs to change her diaper about 8 a.m. that day. There was no medical evidence to provide the link.

64. In *Ocean Trampling Co. Ltd*., Mr. Justice Hunter referred to *McGhee v National Coal Board* [1973] 1 WLR 1 in which the House of Lords said that common sense could be used to fill the gap to prove the causal connection between negligence and injury. I accept that principle of law. In using my common sense, I have to take into account all available evidence before me including the extremely weak state of the Plaintiff’s bones, and the undisputed medical evidence by doctors appointed by both sides that other nursing activity like lifting the Plaintiff up or turning her in bed could equally produce the same fracture. In my view, my common sense tells me that I cannot just ignore such fact and evidence to fulfill up the gap and find firstly Miss Tong had forced open the Plaintiff’s legs and secondly the act fractured her right femur.

65. Furthermore, I also accept Mr. Sham’s submission that the circumstantial evidence proves it more likely than not that the fracture occurred at some other time. The bill issued by the Hospital Authority (page 19 of Part V of the Trial Bundle) proves that the community nurse Miss Tong had visited the Plaintiff on the day in question. Mr. Yip stated that the community nurse visited the Plaintiff at 10 a.m. that day, and that the community nurse had confirmed to him that that was the case. I have no reason to disbelieve that statement. In any event, the community nurse must have arrived earlier than PW1 and must have completed treating the Plaintiff’s sores before PW1 arrived. If the Plaintiff had already sustained the fracture to her right femur at 8 a.m. to the extent that it was dangling as claimed by PW1, the community nurse would have noticed it, and would have brought it to the attention of the D1’s staff. However, nothing of this kind occurred.

66. The evidence also indicated that there were a number of nursing activities performed on the Plaintiff subsequent to Miss Tong Wing Yan changing her diaper at or about 8 a.m. and subsequent to the visit by the community nurse at about 10 a.m. Miss Liu Sun Kwan’s report showed that she had changed diapers for the Plaintiff at 11:15 a.m. as well as at 2 p.m. On both occasions, she noticed that the Plaintiff’s legs were held tightly and saw nothing unusual. The Plaintiff had also been stomach-tube fed two times between 10 a.m. and 2 p.m. (according to the stomach-tube feeding record, page 5 of Part V of the Trial Bundle), and had her body turned to left and to the right, as the case may be, to avoid bedsores for three times between 8 a.m. and 4 p.m. (according to the special personal care records (page 7 of Part V of the Trial Bundle). At about 3 p.m., the Plaintiff’s body had been lifted up and some pillow had been put underneath her head and shoulder as to enable her to have a better sleeping posture, according to the reports given by Miss Liu Sun Kwan and Yu Ngar Ying. The importance of such evidence is, firstly, the fact that so many people did not notice anything wrong or unusual with the Plaintiff indicates that she had not really sustained the fracture to her right femur as early as at 8 a.m., and secondly, the nursing activities carried by any of these people could have caused the fracture due to the extremely weak bones of the Plaintiff, according to the medical evidence.

67. In my view, the evidence points overwhelmingly that the fracture to the Plaintiff’s right femur did not occur at or about 8 a.m. on 26th July 2002 when Miss Liu Sun Kwan and Miss Tong Yan Wing changed her diaper although force had been used by Miss Tong to separate her legs so as to put in the diaper. For this reason, the case as pleaded by the Plaintiff must fail.

68. Mr. Sham further submits that even if it had been proved that the fracture occurred at the time when Miss Tong Yan Wing was separating the Plaintiff’s leg to change her diaper, the Plaintiff has failed to prove that the act was negligent. I agree entirely with his submissions. The evidence points irrevocably that the Plaintiff had been suffering from contracture of all her limbs by early 2002, and that she held her legs tightly together. Since the Plaintiff was unable to move and had to rely entirely upon others to take care of her, D1’s staff had to change diapers for her from time to time, and they had to use some force to separate her legs in order to remove the soiled diaper and put on a new one. Under these circumstances, using force to separate her legs could only be a routine nursing activity for the benefit of the Plaintiff’s care, and that there was nothing in the evidence to show that Miss Tong Yan Wing had done anything negligent or below the ordinary standard expected. The Plaintiff has adduced no evidence to show what should be the appropriate step to take, or what else D1’s staff could have done in changing the Plaintiff’s diaper so as to allege that what Miss Tong had done on 26th July 2002 was below the required standard of reasonable skill and care.

69. There is also one more matter that is of particular importance. The evidence adduced by both sides indicates that nobody knew, prior to 26th July 2002, that the Plaintiff was suffering from severe osteoporosis. In the medical reports included in Part IV of the Trial Bundle concerning the Plaintiff’s admission or treatment in hospital, there was no reference at all to this problem of osteoporosis. In other words, while the staff of D1 had to exercise reasonable skill and care when they changed diapers for the Plaintiff, which necessarily meant that they had to pay particular attention to the fact that the Plaintiff was old and probably fragile, they had no notice at all that the bones of the Plaintiff were in such an extremely weak state, and that it could not have been within their reasonable anticipation that mere routine nursing activity could have caused the Plaintiff to fracture her right femur.

70. Mr. Clough submits that the only evidence as to what had occurred in causing the Plaintiff to sustain fracture to her right femur was the result of D1’s investigation of its own witnesses, but the investigation had been done so inadequately that D1 is not entitled to say that the Plaintiff cannot establish her case because of its own inadequacy. He points out that while DW1 had received a full report from Miss Liu Sun Kwan and then a second report from Miss Tong Yan Wing, even if these two reports did not have differences on the face of them, the key factor of putting on diaper and using force or forcing her leg apart was something that warranted further investigation by D1. However, as Mr. Clough contends, DW1’s explanation as to why she did not investigate is totally inadequate, particularly in circumstances when she knew or ought to have known that the staff who made the report would clearly want to make statements that were exculpatory.

71. In her evidence under cross-examination, DW1 does not accept that the proposition put to her by Mr. Clough. She agrees that the report made by Miss Tong Yan Wing was not as detailed as that of Miss Lui Sun Kwan, and that Miss Tong Yan Wing had not said anything about using force to separate the Plaintiff’s legs to change her diaper, but she maintains that it was not necessarily for her to speak to Miss Tong Yan Wing about these matters because if those were things that had to be done, it was not necessary for them to be stated in the statement. She gives the example that if one goes to toilet, it is not necessary for him to say that he has taken off his pants.

72. In my view, this submission from Mr. Clough cannot assist the Plaintiff’s case. First, the burden of proof lies solely and squarely upon the Plaintiff to prove that D1’s staff had been negligent and that their negligence had caused the injuries to the Plaintiff. Mr. Clough accepts that the burden rests on the Plaintiff in his opening speech. If so, I fail to see why the D1 can be criticized on the ground that it had not investigated the cause of the fracture to the Plaintiff adequately. They can simply do nothing and put the Plaintiff to strict proof. Second, it must be remembered that the Plaintiff has expressly made known that she is not relying on *res ipsa loquitur*, and as such D1 does not even have the evidential (not to mention the legal) burden to disprove negligence.

73. Furthermore, as a finding of fact, I accept that DW1 had been trying her best to investigate the cause of the Plaintiff’s fracture. Once she learned of the incident, she required all those who had personally handled the Plaintiff to provide a written report to her. She did receive 4 reports. Although the 4 reports had differences in details and in length, there was no reason for DW1 to question the veracity of the statements made by their various staff unless and until she had seen evidence to the contrary. She had been trying hard to look for other evidence to verify those reports. She held an oral discussion with the Plaintiff’s family members including undoubtedly PW2, and she also asked PW2 for his cooperation to arrange Mr. Yip to see the Plaintiff’s attending doctors. However, her request had been rejected by PW2, who confirms the truth of DW1’s evidence in this respect. Despite PW1’s rejection, D1 had written to Yan Chai Hospital to find out why the Plaintiff had sustained the fracture. Of course, she got nowhere but it was not due to the fault of D1 or DW1.

74. Both Mr. Sham and Mr. Clough have referred me to the case of *Li Sau Keung v. Maxcredit Engineering Ltd. & Another* [2004] 1 HKC 434. In this case, the Court of Appeal held that where a person without explanation failed to call as a witness a person who he might reasonably be expected to call, it was open to the court or the jury as appropriate to infer that that person’s evidence would not have helped that party’s case.

75. By relying on the *Maxicredit* case, Mr. Clough submits that DW1 is not the best person to give evidence for D1 but she is the only witness called. He submits that Mr. Yip might not be the best person either but he would have more knowledge of the event than DW1. He also says that there must be lot of people who were present during the course of the event that morning in the Nursing Home but none of them testifies. He points out that Miss Tong Yan Wing had gone back to the Mainland, and it was not sure whether Miss Liu Sun Kwan was in Hong Kong as DW1 had not traced the whereabouts of Miss Liu and assumed just that the administrative department of D1 must have looked for her.

76. I do not think the *Maxicredit* principle assists the Plaintiff’s case at all. Unlike *Maxicredit* where the plaintiff had given direct evidence on matters that the defendant could reasonably be expected to call a witness to rebut if those matters were untrue but chose not to do so, in the present case, D1 had already put in evidence from Miss Liu Sun Kwan, Miss Tong Yan Wing, Miss Poon Kwai Chung, Miss Yu Ngar Ying and Mr. Yip via the hearsay notice procedure, but it is the Plaintiff who has not applied to court for them to be called as witnesses. After the hearsay notice has been served, and in the absence of any application for the makers of the hearsay statements to be present in court to testify, D1 is entitled to assume that they can rely on those evidence without the need to call them. In my view, it is not open to the Plaintiff to say now that an adverse inference should be drawn against D1 because witnesses have not been called when it is due to her own fault in not asking for the witnesses.

77. I have given anxious consideration to the Plaintiff’s claim. However, having considered the evidence carefully, I have to say that there is no direct or circumstantial evidence that points to the negligence or breach of contractual duty on the part of D1 or its staff. On the contrary, the medical evidence strongly suggests that the fracture to the Plaintiff’s right femur could have occurred just because of routine nursing activities due to the advanced degree of her osteoporosis of her bones. There is no doubt in my mind that the fracture was not caused by the 8 a.m. changing of diapers. I am not sure at which point of time the fracture occurred though I would have thought it was close to 4 p.m. when PW1 arrived. But I am sure that whatever was done was a routine nursing activity that had been done with reasonable skill and care. In these circumstances, I find that the Plaintiff has failed to prove her claim against D1 either in negligence or in contract. Her claim is therefore dismissed.

##### Quantum

78. In light of my finding on liability, I just wish to say a little bit about quantum should the case goes elsewhere.

79. For pain and suffering and loss of amenities of life (“PSLA”), the Plaintiff is claiming $750,000 (see revised statement of damages).

80. Mr. Sham refers me to cases involving similar injuries including *Lam Choi Tai v Kwok Man Cheung and Yu Cheong Wing*, HCA 5114/1983, *Lai Kwan Ming v. Lee Yin Hing t/a King Yip Co. and China State Construction Engineering Corporation,* HCPI 765/2000, and *Tsang Yuk Ming v, Choi Wing Hing t/a Hing Electrical Co., and others*, HCA852/1989, where sums of $50,000, $276,000 and $120,000 were awarded. Mr. Sham submits that since before the accident the Plaintiff was already 84 years old, paralyzed, bedridden, with severe contracture on all her 4 limbs, unable to speak, and dependent on others completely for daily living, the award under PSLA should be no more than $50,000.

81. In the present case, I bear in mind the particular features of the Plaintiff. It is clear to me that what she has suffered was really pain and suffering rather than loss of amenities of life, as I have difficulty to see what enjoyment of life she has lost when she had been confined to a bed, unable to walk and had to be tube-fed. On the other hand, I consider that she has gone through pain and suffering by the fracture to her right femur, as indicated by her wide wet open eyes, red face and continuous making of noises on the day of accident. I infer that she is also suffering from further pain caused by the mal-union of the fracture. Balancing everything, I am of the view that the proper award for PSLA is $150,000.

82. The Plaintiff is claiming for accrued medical expenses as particularized in the revised statement of damages as well as future medical expenses.

83. I agree with Mr. Sham that due to the very poor general health condition of the Plaintiff, she would have to be confined to a hospital or an aged home even if the accident had not occurred. In the evidence of PW1, she says clearly that she could not have taken her mother home because she has to take care of her children and mother-in-law, and she also says that PW2 could not have done so either since he has his children too and he has to work. Furthermore, the doctors have said clearly that the Plaintiff’s general condition is expected to deteriorate progressively in the future and that the ideal place for her to stay is in a rehabilitation centre, the standard of which should be as good as that of Kowloon Hospital where the Plaintiff is now living. In the circumstances, I see no chance for the Plaintiff to move out of Kowloon Hospital and live elsewhere when her welfare is borne in mind. Since the charges paid by the Plaintiff for living in Kowloon Hospital and the other centres she had lived after the accident is less than the charges she needs to pay to D1 had the accident had not occurred, I find that she has no loss and therefore no award is made under this item.

84. The Plaintiff is also claiming accrued and future traveling expenses incurred by her children for visiting her in hospital. For the same reason, the Plaintiff has not proved that her children had incurred or will incur additional traveling expenses after the accident has occurred. No award is made under this head.

85. The Plaintiff also claims for tonic food in the sum of $10,000. No evidence has been adduced to show that the Plaintiff has consumed any tonic food. The evidence rather shows that she was tube-fed with milk and water only. No evidence has been adduced to show that the tonic food consumed by her, if any, would tend to assist in her recovery. No award is made under this head.

86. In the premises, had the Plaintiff succeeded in the question of liability against D1, I would have awarded her damages in the sum of $150,000, together with interest at 2% per annum from the date of writ to the date of judgment and thereafter at the judgment rate until the date of payment.

##### Costs

87. I see no reason why costs should not follow the event.

##### Order

1. The Plaintiff’s claim against D1 is dismissed.
2. The Plaintiff’s claim against D2 is dismissed.
3. The Plaintiff shall pay costs of this action (including costs that have previously been reserved) to D1 and D2, to be taxed if not agreed, with certificate for counsel. This is an order nisi which shall become absolute within 14 days after handing down of the judgment.

W. K. Kwok

### Deputy District Judge

Mr. Nigel Clough, instructed by Messrs. Yeung & Chan for the Plaintiff.

Mr. Walker Sham, instructed by Messrs. Lily Fenn & Partners for D1 & D2.