DCPI 1255/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSON INJURIES ACTION NO. 1255 OF 2006

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BETWEEN

##### TSE FUNG SIN, the administratrix of Plaintiff

the estate of TSE CHOI YING, deceased

##### and

##### TUNG WAH GROUP OF HOSPITALS Defendant

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Coram : Her Honour Judge H.C. Wong in Court

Dates of Hearing : 28th-30th August 2007, 3rd September 2007 &

10th September 2007

Date of Handing Down Judgment : 24th October 2007

JUDGMENT

1. The Plaintiff is the administratrix of the estate of Tse Choi Ying, deceased, who died intestate on the 16th day of December 2004. The Plaintiff claims against the Defendant, the Tung Wah Group of Hospitals, under the Occupiers’ Liability Ordinance Cap. 314 (“the Ordinance”) as the operator of an institution known as Tung Wah Group Hospitals Jockey Club Tsin Cheung Day Activities Centre cum Hostel at the Jockey Club Rehabilitation Complex, 2nd floor, Block D, 4 Welfare Road, Aberdeen, Hong Kong (“the Hostel”).
2. The deceased (“Choi Ying”) was admitted into the Hostel in or about 26 November 2001 as a trainee and resident until she was admitted into hospital for treatment of brain cancer from which she died on 16th December 2004.
3. The deceased was born on 17th January 1964, she was aged 40 when she died in December 2004. At the time of admission to the hostel in November 2001, the deceased had a known history of mental retardation, epilepsy, and low grade glioma of the brain (a form of brain tumour) with weakness to the left side of her body.
4. Mr. Wong, counsel for the Plaintiff, admitted at the beginning of the trial that the deceased’s death was caused by her brain tumour which had become malignant. Her death was not due to any of the actions or negligence on the part of the Defendant. The Plaintiff is seeking compensation for the breach of common duty of care under Sec. 3 of the Occupiers’ Liability Ordinance and for the negligence of the Defendant’s servants or agents in failing to take reasonable care of the deceased as a resident and trainee at the Hostel. It is the Plaintiff’s case that Choi Ying sustained injuries due to a fall on 31st October 2003 which was caused by the hospital’s failure to maintain a safe environment for Choi Ying or to take reasonable steps to ensure that Choi Ying’s stay at the Hostel was free from injuries.

**The Plaintiff’s Case**

1. The Plaintiff relied on the records kept by the Defendant and the hospitals alleging 14 incidents of falls and injuries on various days prior to the accident on 31st October 2003 to show that Choi Ying was prone to falling while she was a resident at the Hostel and that Choi Ying’s fall on 31st October 2003 was within the Defendant’s contemplation.
2. An account of Choi Ying’s falls and injuries during the period she was a trainee at the Hostel is set out in Schedule A to the closing submission of Mr. Wong. Mr. Wong referred to the incident reports recorded by the Hostel involving Choi Ying. They included the following:

1. 31.1.2002 Slipped from sofa next to nursing room resulting in pain of left wrist and hip (B673).

2. 1.2.2002 Suspect fall discovered during family visit in the afternoon resulting in hospital visit and treatment on 2nd February 2002 (B673).

3. 10.2.2002 Slipped and fell during evening cleaning when the staff was not able to keep her steady. She was found to have suffered a left palm fracture on 11th February 2002 and received a cast on the left palm, it was removed on 23rd February 2002 (B687).

4. 15.3.2002 Choi Ying found lying on the floor (B21).

5. 18.3.2002 Found sitting on floor after washing up (B821).

6. 30.5.2002 Bruises found on left shoulder and left leg (B698).

7. 2.6.2002 Found on ground with quadripod crushed (B695).

8. 8.7.2002 Knocked down close to the entrance (B702).

9. 6.3.2003 Fell while walking back to her bed at 4:00 p.m., her left kneecap was bruised (B725).

10. 7.4.2003 Fell in her bedroom at night while walking to the toilet (B732).

11. 13.6.2003 Knocked down by other inmates and suffered bruises to left finger (B736).

12. 22.6.2003 Fell from bed while waiting for her bath (B741).

13. 21.7.2003 Pushed by inmate, fell and knocked against a chair (B743).

14. 1.9.2003 Fell in the toilet resulting in bruises on left thigh (B749).

15. 13.9.2003 Fell from chair (B830).

Records at Princess Margaret Hospital on 15.9.2003 confirmed she had an injury to the left shoulder (B607 & B628).

16. 31.10.2003 Found to have fallen to the ground. She was found by the nurse on duty to have lost consciousness for one minute and taken to the Queen Mary Hospital in an ambulance (B761).

1. The Plaintiff further claimed that the Hostel knew Choi Ying had a history of falling because the Hostel staff had been informed of it on the first day of admission by the Plaintiff Tse Fung Sin (“Fung Sin”), Choi Ying’s elder sister. It was noted on the Defendant’s record and registration form, Choi Ying suffered from weak left limbs and had difficulty living on her own, that was the reason why she was admitted to the Hostel for training (B660). The registration form (B656-658) further recorded the reason for Choi Ying seeking admission into the Hostel was so that she could be looked after and her sister Fung Sin would not be required to bathe her and deliver meals to her daily and that Choi Ying would be trained to develop her potentials for self care.
2. The Plaintiff further claimed that the Hostel staff knew of Choi Ying’s oedema was the reason for her difficulty in balancing resulting in a tendency of falling. The Plaintiff relied on the Defendant’s record of accidents involving Choi Ying and the recommendations made by the Defendant’s Hostel staff.
3. The Plaintiff claimed that the Defendant failed to heed its own staff’s recommendations and refused to put Choi Ying in a wheelchair or send a staff to accompany Choi Ying whenever Choi Ying used a quadripod to walk in the Hostel, visited the toilet after meals and before bed time. The Plaintiff claimed that it was because the Hostel staff had failed to escort Choi Ying after breakfast on 31st October 2003 or put her in a wheelchair that resulted in Choi Ying’s fall near the doorway of room 210. The Plaintiff further claimed that Choi Ying was pushed in the morning of 31st October 2003 that resulted in the fall.
4. It is the Plaintiff’s case that the Defendant was negligent and in breach of a common duty of care under Sec. 3 of the Ordinance; it had failed to take any reasonable care to see that Choi Ying would be safe in the Hostel. The Plaintiff further claimed that the Defendant failed to maintain a safe environment for Choi Ying knowing she was prone to fall if allowed to walk unassisted due to the oedematic condition of her left lower limb.

**The Defence Case**

1. The Defendant claimed it had discharged its duty of care to Choi Ying, that she was safe as a trainee and resident at the Hostel and that the Defendant had taken reasonable steps to ensure Choi Ying would not be exposed to risks of injuries. The Defendant further maintained that Choi Ying’s fall on 31st October 2003 was due to a spontaneous haemorrhage of her brain tumour. The Defendant relied on the findings in the medical reports of Dr. Edmund Woo and Dr. Yu Yuk Ling. Doctors Woo & Yu both concluded that Choi Ying’s fall on 31st October 2003 was due to the increasing debilitating effects of Choi Ying’s brain tumour which suffered a spontaneous haemorrhage that caused Choi Ying to fall on the day of the accident. The fall was inevitable and unavoidable and it was not caused by any negligence on the part of the Defendant.
2. The Defendant further claimed that Choi Ying’s fall on 31st October 2002 was due entirely to her own carelessness; it could not have been avoided even if Choi Ying was escorted by the staff of the Hostel at the time. The recommendation for Choi Ying to be accompanied to the toilet after breakfast was made on 23rd August 2003 which was duly implemented by the Hostel staff.
3. As to the alleged left hand injury of Choi Ying on 11th February 2002, the Defendant claimed that the Hostel did not receive any medical slip or report from the Princess Margaret Hospital referring to a fracture sustained by Choi Ying. During the period of 11th to 17th February 2002, Choi Ying was on Chinese New Year home leave. The Defendant’s Hostel record did not show Choi Ying had sustained any fall or injuries before her home leave on 11th February 2002, the allegation was made only after she returned from leave on 18th February 2002.
4. The Defendant claimed that Choi Ying and her elder sister did not request for the use of a wheelchair during this period of time. Choi Ying was given a wheelchair between 18th February to 24th February 2002 because of her left hand injury, it was withdrawn on 25th February on the advice of the nursing staff after Choi Ying’s cast on her left arm was removed. The Defendant claimed that Choi Ying was put in a wheelchair whenever her left leg was found to be swollen (P.B783) and taken off when the swelling improved to encourage her to exercise her limbs. The Defendant claimed it was only sometime in late 2003 that the Plaintiff requested for a wheelchair for the Defendant, her application for a wheelchair from the Social Welfare Department was approved in January 2004. Unfortunately, the Plaintiff failed to consult the Hostel’s staff before she purchased the wheelchair which was found to be unsuitable for Choi Ying upon delivery to the Hostel on 29th May 2004 (P.A244). The foot rests and back of the wheelchair had to be altered to fit Choi Ying before it was put to use.
5. The Defendant further relied on 2 letters written by the Plaintiff published in the Defendant’s newsletters of April 2002 and March 2003 thanking the Hostel for the care and training given to Choi Ying to show that the Plaintiff and Choi Ying were happy and satisfied with the care and training at the Hostel.
6. It was the Defendant’s evidence that the Hostel’s staff including the nurses, the caretakers and the physiotherapists had kept a close watch of Choi Ying’s oedematic condition at her left limbs and the doctors had prescribed diuretics for Choi Ying to reduce the oedema. According to physiotherapist Mr. Pei, Choi Ying would only be given a wheelchair if her walk was unsteady due to the oedema on her left lower limb, it would be withdrawn when the oedema improved before the fall on 31st October 2003.
7. According to the evidence of Miss Cheung Yuet Wah, the case social worker at the Hostel, Choi Ying was usually the first to finish breakfast in the morning, as a matter of routine; she would be the first of 17 trainees taken to the toilet after breakfast. As the accident on 31st October 2003 took place at about 8:30 a.m. Choi Ying must have already been to the toilet after breakfast. The evidence of the Hostel staff also showed Choi Ying would have been taken to the toilet before her fall on 31st October 2003.

**The Issues**

1. Whether the Defendant was in breach of a common duty of care to Choi Ying under Sec. 3 of the Ordinance.
2. Whether the Defendant was in breach of a common law duty of care to Choi Ying as a trainee at the Defendant’s Hostel on the day of the accident 31st October 2003.
3. Whether the deceased or the Plaintiff had contributed to the negligence resulting in Choi Ying’s fall on 31st October 2003 by concealing Choi Ying’s recurrent brain tumour from the Hostel staff.

**Findings**

Liability

1. The Plaintiff relies on Section 3 of the Occupiers’ Liability Ordinance which provides that:

“3. Extent of occupier’s ordinary duty

(1) An occupier of premises owes the same duty, the “common duty of care”, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases -

1. An occupier must be prepared for children to be less careful than adults; and
2. An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinary incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -

(a) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;”

1. The Defendant’s Hostel is a rehabilitation centre for moderate to severe mentally retarded persons, to help them to establish and improve their ability to live and take care of themselves in their daily lives. Choy Ying was mentally retarded from a young age. On 7th June 1999 she received an operation involving partial removal of her brain tumor. According to the Hostel’s record on Choi Ying, on admission, she was said to suffer from moderate mental retardation, had a partial brain tumour removed and had pre-existing left hemiplegia and suffered from epilepsy. According to the Defendant’s witnesses, the Hostel would not require a trainee’s guardian or next of kin to produce a full medical record on the trainee because of data privacy protection reasons. It only required the trainee or his/her guardian to produce a letter from a general practitioner certifying the medical condition of the trainee. The guardian or next of kin of the trainee is responsible for taking the trainee to clinics and hospitals for his/her regular follow up treatments. Upon admission at the end of November 2001, Choi Ying was evaluated by the physiotherapist Mr. Pei who recorded that: “Even she could ambulate independently without aid, she demonstrated with fair stability and with decreased (L) hip, knee control. Thus, she was given a quadripod for ambulation. Her sitting balance was satisfactory and her standing balance was fair only. She was able to perform sit to stand independently. However, she also demonstrated not much active movement over her (L) upper limb (0/5) and (3+/5) over her (L) lower limb in gross muscle testing. Tubrigrip was given to her left foot due to swelling.” (Physiotherapy Report dated 24th March 2005 on page A 90).
2. According to the registration form record of 9th November 2001, prepared by the social worker Cheung Yuet Wah (DW2) as a background report of the trainee prior to admission, paragraph 9, under ‘case analysis’ she recorded:

“1. 學員現佳段既能獨居，自理能力理應不錯，實際上學員在某些重要的自理項目上表現也不算很好，例如穿衣和沖涼。這可能由於學員近年左邊手腳不靈活所致，但工作員相信學員由小至今也沒有人教導過她此等自理項目，因父母對她過份溺愛，一直以來也照顧週到；至父過身，母年老時又有姊協助或進私營院舍等暫托服務，把學員的潛能埋沒。故此若學員有機會入宿本中心接受訓練，學員在各方面能力均有機會提升。

2． 此外，學員1½ 年前發現腦生瘤，已作切除手術，但仍有少部份在腦內，因有很多神經位置靠近，故不宜切除。但此瘤屬良性，對學員不構成生命危險，現按時覆診腦神經外科。但上次手術後令學員左邊手腳失去大部份感覺。工作員認為現在學員手腳變得不靈活的另一原因是手術後學員並沒有跟進物理治療訓練，故左邊肌能愈來愈差。所以若學員入宿後，可轉介物理治療服務，改善其左邊活動能力。

…………

5． 現在學員獨居，曾經試過跌倒在地上，疑因肥胖不能自行起身及腳有些痛，學員自行爬往母親在港時使用之「救命鍾」並按掣，房署派人到她家時把她扶起，她又指示房署職員致電其姊；由此可見學員很冷靜，並能自行思考自救步驟。（此次跌倒學員並無入院，因沒太大損傷。）(page A83 to A84 of Bundle)”

1. In paragraph 10 of the registration form, Miss Cheung recommended the following:

“1. 盡快安排學員面談及入宿，入宿後轉介物理治療跟進其左邊手腳肌能情況。

1. 加強訓練自理項目，提升自我照顧能力。
2. 教導與人溝通之技巧。”(page A83 of Bundle)
3. It was based on the aforesaid information and recommendations that Choi Ying was admitted into the Hostel. According to the evidence of the Hostel’s supervisor Miss Jenny Yu (DW1), the information was supplied by Fung Sin, the guardian of Choi Ying, at the interview and home visit conducted by the Hostel social worker Miss Cheung Yuet Wah (DW2). Miss Yu claimed that there was nothing to indicate at admission that Choi Ying was suffering from recurrent tumour. Miss Yu maintained that had the Hostel found out Choi Ying had a recurrent brain tumour she would not have been considered suitable for the Hostel. In Miss Yu’s view, a person with a recurrent brain tumour would require more nursing care and should be admitted to an institution designed for such patients. Miss Yu further claimed that it is incumbent upon the family and guardian of the trainee to inform the Hostel of any changes in the medical condition of the trainee. The Hostel relied on the information disclosed by the family member or guardian who took the trainee to her/his regular medical appointments. The Hostel staff would not be able to obtain such information from the trainee’s doctors. Therefore, if the family member or guardian of the trainee who accompanied the trainee to follow-up treatments failed to inform the Hostel the up-to-date medical condition of the trainee, there is no way the Hostel staff could have obtained such information. Though the nursing staff of the Hostel would keep a record of the reply slips signed by the attending doctors of the trainee after each medical visit, the reply slips would not disclose the full details on the trainee’s medical condition.
4. So far as Choi Ying was concerned, Miss Yu admitted the nursing staff at the Hostel had noticed a gradual deterioration of Choi Ying’s ambulatory ability and discussed it at the 23rd August 2003 class meeting, after which the Hostel staff had discussed Choi Ying’s condition with the Plaintiff and requested her to talk to the doctor at the next medical appointment. It was beyond the control of the Hostel, however, if the Plaintiff failed to take up the matter with Choi Ying’s doctors. Miss Yu further claimed that the Hostel would conduct a yearly review on each trainee at a meeting with the trainee’s family member or guardian. The meeting would be attended by the social worker, the nurse, the trainee and her family member. At the meeting, a report on the trainee’s progress, her health condition and the daily activities during the year would be discussed. The trainee and her family member or guardian would have an opportunity to raise any matter of concern and take part in reaching a consensus on the training direction for the trainee in the following year.
5. From the Defendant’s Hostel record, it is clear that the Hostel emphasized on physical training of trainees to strengthen their self help capacity. A record is kept on the progress, exercise and physiotherapy training with ratings on the progress of each trainee. Detail recordings of each incident involving each trainee are kept by the Hostel. In Choi Ying’s case, each family visit and conversation with the family member involving Choi Ying, record of medical visits by Choi Ying escorted by the Plaintiff and reply slips signed by Choi Ying’s doctors, the drugs prescribed for Choi Ying and each incident at the Hostel and injuries found on Choi Ying by the staff of the Hostel would be carefully kept by the Hostel staff. There would be an incident report if Choi Ying had an accident at the Hostel with recommendations from the staff reporting the incident. Choi Ying would be further examined by the nursing staff at the Hostel for any injuries sustained and if necessary, arranged for medical attention. The Plaintiff had based her case on the same Hostel records on Choi Ying in her claim against the Defendant.
6. The Plaintiff did not dispute she had failed to disclose to the Hostel that Choi Ying’s brain tumour had recurred, she claimed that she did not know about the recurrence of Choi Ying’s brain tumour, she further claimed she believed the doctors had recorded the details on the reply slips. From the medical records of the doctors at Tuen Mun Hospital Neurosurgery Department during the relevant period of time, Choi Ying’s brain tumour had returned before her admission to the Hostel. The medical report of Dr. Hung Wai Man, medical officer at the Department Neurosurgery of Tuen Mun Hospital (page A277 of the Bundle) recorded at paragraph 5 of the report “She was regularly followed up in our clinic. Postoperative MRI brain was performed and increasing size of residual tumour informed to relatives in 2001. But they refused second operation. She was admitted to Queen Mary Hospital for head injury in November 2003. We took over the patient and surgical excision offered. But her sister refused operation again.”
7. The consultation summaries on Choi Ying indicated that the doctors at the Neurosurgery Unit of Tuen Mun Hospital had discussed with the Plaintiff on numerous occasions about Choi Ying’s recurrent brain tumour. They are found at:
   1. Page B587-6, Discharge Summary from Tuen Mun Hospital on 24th May 2001: “Admitted through OPD for increased seizure attacks recently and MRI showed small tumour recurrent.” “Discussed with sister, not for operation at the moment. Living in Tsuen Wan area, needs to arrange NEATS when FU”.
   2. Page B584, Consultation Summary at the Specialist Out-Patient Clinic of Dr. Yuen, Senior Medical Officer at Tuen Mun Hospital dated 21st August 2001, “Conscious. No convulsion. Left upper limb decreased in power Gr0/5. .LL power Gr4+. Now walk with stick. Obese. Patient’s sister reluctant to proceed to second operation.”
   3. Page B587-5, recording by Tuen Mun Hospital on Choi Ying’s medical history on admission to the hospital on 19th November 2001: “Known MR, Epilepsy, Right frontal low grade glioma with partial removed in 6/99. Residual LT. UL paralysis (1-2/5). Recent MRI (in March, 01), small tumour recurrence, pt and relative reluctant to have reoperation.”
   4. Page B575, Discharge Consultation Summary from Tuen Mun Hospital of 8th January 2002 by Senior Medical Officer Dr. Yuen: “Left hemiparesis Gr4 power. Walk with quadripod. No convulsion. Now resided in hostel. Refuse operation at this stage.”
   5. Page B586, Neurosurgery Consultation Summary on 15th July 2002 by Dr. Leung, Senior Medical Officer at Tuen Mun Hospital: “walk with quadripod in hostel, no headache, no fit, appetite, discuss with sister, refuse surgery for the time being, risk of progress explained.”
   6. Page B574, recorded by Dr. Leung Kar Ming, Senior Medical Health Officer, on 17th March 2003 : “living in hostel, epilim level 680, GBP normal, no headache, no fit, obey command, recognize her sister, use wheelchair because of fear of fall, come with sister, reluctant to have surgery and other intervention, condition explained, advice to bring her back early if condition deteriorated.”
8. From the aforesaid records, it is clear the Plaintiff had not been entirely truthful about her lack of knowledge of the recurrent tumour. At cross-examination by defence counsel, she maintained that the doctors at Tuen Mun Hospital did not tell her Choi Ying’s brain tumour had recurred, but she did admit she had refused the doctors’ suggestions to a second operation on Choi Ying.
9. I find it difficult to accept that the Plaintiff had not been told by the doctors about Choi Ying’s recurrent brain tumour after the MRI in March 2001. The records fully indicated that the recurrent brain tumour had been explained to the Plaintiff and the doctors had recommended a second surgery repeatedly. Medical records also showed that the Plaintiff when informed by the doctors at Tuen Muen Hospital Neurosurgery Unit that surgical removal of the recurrent brain tumour was recommended she had repeatedly refused a second operation. There were further refusals to operate after Choi Ying’s fall on 31st October 2003 up to Choi Ying’s death.
10. I am satisfied that the Plaintiff had full knowledge of Choi Ying’s recurrent brain tumour months before Choi Ying was admitted into the Hostel, yet she failed to disclose it to the Hostel staff at the pre-admission home visit and the interview prior to Choi Ying’s admission on 26th November 2001. She further failed to disclose it to the staff of the Hostel after Choi Ying’s admission though she had accompanied Choi Ying at follow-up appointments at Tuen Mun Hospital and had been informed of the state of Choi Ying’s growing brain tumour and the doctors’ recommendations for a second operation to remove the recurred brain tumour. While Choi Ying who suffered from mental retardation might not have fully understood the effects of concealment of her medical condition from the Hostel, it was clearly a material non-disclosure on the Plaintiff’s part. This, in itself, had affected the Hostel’s assessment and training plans for Choi Ying. Miss Jenny Yu, the supervisor and Mr. Pei, the physiotherapist, both maintained that had the Hostel been informed of Choi Ying’s recurrent brain tumour, she would not have been admitted into the Hostel. She would most probably be admitted into an institution more appropriate for her care.

Medical expert opinions

1. The Plaintiff produced a neurologist report dated 22nd May 2007 from Dr. Yu Yuk Ling, a specialist in Neurology. The Defendant produced a separate neurologist’s report dated 17th April 2007 from Dr. Edmund Woo. Both medical experts examined the MRI scan and CT scan of Choi Ying’s brain in June 1996, and the MR scan in July 1996 taken at the Princess Margaret Hospital. They also examined the brain scans on Choi Ying taken in 1999 before and after her operation at Tuen Mun Hospital on 7th June 1999. Both doctors had also compared the MRI brain scans of Choi Ying taken on 21st March 2001 and on 11th November 2003 and concluded that by March 2001 the tumour had recurred with significant peri-tumour oedema which explained the development of her left hemiparesis at the time. At paragraph 19 of Dr. Yu’s report (page B631), he remarked:

“MRI brain on 11.11.2003 showed that the right frontal tumour had further increased in size with marked oedema that extended from the frontal lobe to the occipital lobe, and across the midline to the deep portion of the left cerebral hemisphere. Several areas of subacute haemorrhage were present within the tumour, but haemorrhage was not present in other parts of the brain. There was a moderate degree of midline shift. The age of the haemorrhage within the tumour corresponded to the time of her fall at the Hostel.”

1. Dr. Yu gave his opinion at paragraph 23 of his report (page B633):

“Her clinical course correlated well with the MRI findings. On 5.10.1999 only residual tumour with mild mass effect was present. However, on 21.3.2001, the tumour grew in size with increased contrast enhancement and marked peri-tumour oedema. MRI on 11.11.2003 revealed further increase in tumour size and oedema, and also haemorrhage within the tumour.

The treatment for her glioma at this stage is surgical excision, followed by radiotherapy and/or chemotherapy. However, the offer of such treatment was repeatedly declined by her family.

She had a number of falls at Hostel: on 31.1.2002 when she sustained a left scaphoid fracture; in September 2003 when she sustained left shoulder injury; on 31.10.2003 when she sustained head injury.

On 31.10.2003, she fell on her left side with impact on the head, following which she lost consciousness for about one minute. She had headache but no vomiting or convulsions. She sustained bruises on her left forehead and behind her left ear but there was no skull fracture. According to established criteria, the head injury would be classified as mild.”

1. Dr. Yu commented at paragraph 22 (page B632):

“It is well-recognised that over time, a low-grade glioma not uncommonly evolves into a high-grade glioma. Moreover, in some cases, the low-grade and high-trade components co-exist in the same tumour.”

1. Dr. Yu concluded at paragraph 25 of his report that Choi Ying’s fall did not result in the classical type of traumatic cerebral haemorrhage because her CT brain scan did not show typical features associated with multi-focal haemorrhages with involvement of the frontal and temporal lobes of the brain, nor did Choi Ying had immediate marked and sustained impairment of consciousness. At paragraph 26.1 of his report he concluded:

“The haemorrhage within the brain tumour was spontaneous in nature due to rupture of the abnormal vasculature of the tumour, an event which occurs in high-grade gliomas. It is likely that this spontaneous haemorrhage had caused sudden disturbance of Mdm. Tse’s neurological function and resulted in the fall.”

1. Dr. Wu at paragraph 7 of his report (P.B618) said:

“7. The superficial bruises on the scalp were the result of the fall but the hemorrhage inside her tumour as shown on CT and MR scans was not.

While it may be argued that her fall and her head injury might have resulted in intracranial bleeding, it must be noted that the impact to her head at the time of her fall was directed at the left fronto-temporo-parietal region and such was not expected to cause bleeding deep inside the contralateral right cerebral hemisphere. The hemorrhage within the brain tumour was a spontaneous event due to the malignant nature of the lesion, such bleeding causing a sudden deterioration in motor strength as a result of which Madam Tse fell. Therefore, the bleeding within the tumour is the cause, rather than the result, of her fall.”

1. It is the conclusion of both doctors that the bleeding within the tumour is the cause, rather than the result of Choi Ying’s fall. Both doctors further concluded that Choi Ying’s fall had not resulted in any material deterioration of neurological status, that her neurological deterioration and her later death were due to the adverse effect of the brain tumour (page B640).
2. Given that the cause of Choi Ying’s fall on 31st October 2003 was the haemorrhage within the brain tumour as a spontaneous event and that the bleeding causing a sudden deterioration in motor strength which caused Choi Ying’s fall, it cannot be said that the fall was due to the negligence or breach of duty of care of the Defendant.
3. Mr. Wong, counsel for the Plaintiff, submitted that Choi Ying’s fall was reasonably contemplated from the time of her admission to the Hostel based on the history of a series of falls and injuries suffered by Choi Ying prior to the accident on 31st October 2003. Furthermore, the Hostel had devised a system and made recommendations specifically catered to protect Choi Ying from falling but the Hostel had failed to follow the recommendations. The Defendant therefore owed a duty of care to Choi Ying to take reasonable steps to prevent her from the harm of falling. Mr. Wong relied on paragraphs 5-23 to 5-25 of Winfield and Jolowicz on Tort 17th Edition at pages 174 to 176.
4. The passages referred to by Mr. Wong refers to an imposition of duty and the breach of that duty based on the relationship between the occupier and the visitor:

“5-23 ……………

where a duty is imposed because there is a “special relationship” between the parties it might be said that in entering that relationship the defendant had assumed responsibility for the claimant’s safety or well-being. But some such assumption or relationship distinguishes the defendant from a mere stranger.

5-24

(a) *Relationships of dependence.* A duty to act may be imposed where the claimant is under the care or control of the defendant and is incapable of protecting himself. …………

5-25(b) Other relationship with the victim …………

An occupier is under a duty to take reasonable care to ensure that his premises are reasonably safe for the purposes for which his visitor enters and owes duty (although a rather more restricted one) to trespassers and both of these may clearly require positive steps, for example to do repairs or put up warnings, though the occupier is not required to prevent people from encountering obvious risks like climbing trees or swimming in lakes.” ……………

1. Miss Kwok, Counsel for the Defendant, argued that the Plaintiff had failed to prove a causal connection between Choi Ying’s fall and any negligence on the part of the Defendant. She relied on the judgment of Hunter J.A. in the case of Lee Kin Kai v. Ocean Tramping Co. Ltd. (1991) 2 HKLR 232, at page 235I-236B where he held:-

“First, causation is essentially a matter for the judge, not for the doctors. It is a matter upon which the judge will no doubt be assisted by the medical evidence but he is not dictated to by it. Secondly, it is important to bear in mind that the law and medicine here, it seems to me, apply quite different standards. In law, there is a sufficient casual connection if it is shown on a balance of probabilities that the accident was a substantially contributing cause of the injury. A cause is sufficient; it needs not be shown to be the sole cause. Thirdly, a judge when considering causation is not only entitled, he is bound, to use his common sense, to approach the question in the same way as would a juror.”

1. I agree with Miss Kwok that the cause of Choi Ying’s fall was the bleeding within the tumor rather than her being pushed or knocked down by other residents. There was no such evidence in support of the allegation.
2. The Hostel was ignorant of Choi Ying’s recurrent brain tumour which was the cause of her gradual deterioration in motor strength, which in Dr. Woo’s opinion could not be improved by physiotherapy or exercise at the Hostel. Dr. Yu cited the falls on 31st January 2002, 5th September 2003 and 31st October 2003 as evidence of Choi Ying’s gradual deterioration caused by the increase in size of the tumour in Choi Ying’s head (see para. 31 above). I am satisfied that had the Hostel known the recurrent brain tumour of Choi Ying at the time of admission and during the time she was a trainee at the Hostel, the plan for Choi Ying’s training at the Hostel would have been very different. In fact, it is likely the Hostel would have recommended Choi Ying be transferred to a different institution. This was indeed recommended after she returned to the Hostel from the hospital in November 2004. I find the fall due to brain haemorrhage suffered by Choi Ying could not have been foreseen because of the concealment of her recurrent brain tumour by the Plaintiff from the Hostel. All along, the Hostel staff mistakenly attributed the cause of Choi Ying’s difficulty in balancing her steps to the oedema of her lower limbs; in fact, the real culprit was the recurrent brain tumour which turned malignant and was growing in size.
3. I refer to the case of Holgate and another v. Lancashire Mental Hospital Board Gill and Robertson [1937] 4 All ER 19 and the case of Kelly v. Board of Governors of St. Lawrence Hospital [1988] I.R. 402. Negligence could only be found if there was a failure to exercise care and control, having regard to the character and past history of the patient. In Holgate’s case, the court found that the Calderstone Institution in Lancashire knew the mental patient had been convicted of assaults on a number of occasions when the patient was let out on a licence. During the period of the extended licence, the patient assaulted the plaintiff savagely. In the case of Kelly, the plaintiff who suffered from epileptic attacks was taken off all medications for the purpose of observation; the defendant was found liable for injuries sustained by the plaintiff who was left unattended and climbed out of the window. In both cases, the patients’ medical histories were known to the defendants.
4. I have considered the Hostel’s incident reports on various falls and injuries sustained by Choi Ying prior to 31st October 2003, I have also considered the evidence of the Defendant’s witnesses such as the nurse, the physiotherapist Mr. Pei and the centre supervisor Miss Yu. It is clear that the Hostel had imposed and devised care and training plans for each of its trainees based on the medical history and health condition of each trainee. Relying on what was disclosed by the Plaintiff to the Hostel at the time of admission of Choi Ying and information related from time to time by the Plaintiff to the nursing staff of the Hostel during Choi Ying’ stay at the Hostel, the care and training given to Choi Ying by the Hostel was an appropriate one. It is plain from the records that the Hostel’s staff had taken full consideration as to when and under what circumstances Choi Ying needed to be escorted or whether a wheelchair should be used by her. This decision was clearly made after due consideration of the circumstances at the time based on the medical conditions of the trainee disclosed to the Hostel from time to time. These decisions were well documented. Contrary to the Plaintiff’s claim, the reply slips submitted to the Hostel after each medical visits by Choi Ying recorded the symptoms, treatments administered and medicine prescribed by the doctors, they failed to disclose the recurrence of Choi Ying’s brain tumour which was made known to the Plaintiff by the doctors prior to Choi Ying’s admission to the Hostel.
5. In considering if Choi Ying’s fall could have been prevented had she been escorted at the time prior to the fall, I take into account the timing of the fall which indicated that Choi Ying must have finished her breakfast and finished with her toilet visit. She was seen approaching the TV area of the room before the fall took place, as Choi Ying was a fully grown adult of over 160 pounds, it would be unlikely that anyone escorting her could have prevented the fall even if she was escorted at the time. The accident report of 5 September 2003 recorded that Choi Ying fell down under escort of a Hostel staff in the toilet, and the staff was not able to prevent the fall because of Choi Ying’s weight (P.B749). In any event, according to the neurologists’ reports, the injuries due to the fall was described as a mild one and had not resulted in any material deterioration of Choi Ying’s neurological status because her fall was caused by the haemorrhage in the tumour that affected her motor ability. As were the 3 previous falls referred to in Dr. Yu’s report.
6. Applying the foreseeability test, I have assessed the facts against the legal standard and Lord Denning’s dicta in the case of Stewart v. West African Terminals Ltd. [1964] 2 Lloyd’s Rep. 371 at 375:

“It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequences.”

Because the Plaintiff had concealed Choi Ying’s recurrent brain tumour and her doctors’ repeated advice for surgery from the Hostel, Choi Ying’s fall could not reasonably be foreseen by the Hostel. Furthermore, the number of staff employed by the Hostel accorded with the guidelines and recommendations of the Social Welfare Department, the Hostel was clearly not designed or equipped to escort each of its trainees every minute of the day. It would be unreasonable to expect the Hostel to do so. I am satisfied the Defendant had provided an adequate system of care to its trainees and did pay special attention to Choi Ying’s needs based on conditions known to the Hostel. Choi Ying was told to ask for help if she needed it and told to wait for assistance if she wanted to move about. It is apparent she had failed to do so on 31st October 2003.

1. After taking all the circumstances into consideration, I find the Plaintiff has failed to prove that the Defendant was negligent or was in breach of a common duty of care under Sec. 3 of the Occupiers’ Liability Ordinance. I therefore dismiss the Plaintiff’s claim.

Costs

1. Costs nisi order. Cost should follow the event. The Defendant’s cost should be borne by the Plaintiff, to be taxed, if not agreed, with certificate for Counsel.

( H.C. Wong )

District Court Judge

Parties :

Mr. Wong Chao Wai Brian instructed by Messrs. Peter K.H. Wong & Co. assigned by D.L.A. for the Plaintiff.

Miss Vanessa Kwok instructed by Messrs. Lo & Lo for the Defendant.