#### DCPI 1542/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1542 OF 2008

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| BETWEEN | CHAN KAM CHU | Plaintiff |
|  | and |  |
|  | CHU WING WAH and CHAN SZE LUNG sued on behalf of themselves and all other managers of the management committee of CNEC LUI MING CHOI PRIMARY SCHOOL as at 5th August 2005 | Defendants |

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##### Coram: Deputy District Judge Bernard Mak in Court

Date of Trial: 19th–20th, 23rd & 26th February 2009

Date of Handing Down Judgment: 4th September 2009

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###### JUDGMENT

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Background

1. The Plaintiff, Madam Chan, worked as an Office Assistant at CNEC Lui Ming Choi Primary School (“the School”). On 5th August 2005, at approximately 11:15am, Madam Chan slipped on the staircase in the School between the 1/F and 2/F (“the Stairs”). As a result, she suffered injuries to her back. Madam Chan claims that the Defendants were liable for negligence and also liable under the Occupiers Liability Ordinance (Cap.314) and the Occupational Safety and Health Ordinance (Cap.509).

Issues

1. The issues at the trial are:
2. Did the accident happen in the manner alleged by Madam Chan?
3. Was the accident caused by the negligence of the Defendants?
4. Quantum

*Did the accident happen in the manner alleged by Madam Chan?*

*Plaintiff’s evidence*

1. The accident in question occurred while Madam Chan was walking down the Stairs. Madam Chan was the only witness for the Plaintiff.
2. In recalling the events prior to the accident, Madam Chan said that the reason she walked up to the 4/F storeroom was because, upon her own initiative, she went to inventory some books and bring some copies of them back to the school office. Madam Chan said that while walking up the stairs, she had noticed there was sand on the steps as she was able to feel sand particles under the soles of her shoes. She said the environment was noisy with decoration works going on, but she also said while walking on the stairs, she could hear the sound of sands rubbing between her shoes and the steps. She saw sands falling down from staircase above and as such, she walked up the stairs in such a way as to avoid the sands. Although she felt that the situation was dangerous, she did not inform any of the cleaning staff as she did not see any of them before the accident took place.
3. Madam Chan also gave evidence that prior to reaching the storeroom, she had brought some letters to the 3/F staffroom upon the instructions of headmaster Kwan, where wall demolition works were carried out sometime at or around the material time. Madam Chan said that at the time she entered the 3/F staffroom on the date of the accident, the wall had already been taken down and no worker was present in the staffroom.
4. When giving evidence, Madam Chan said that after counting and tying together some student handbooks and school exercise books in the 4/F storeroom, she proceeded to take the lift back down. However upon waiting for 3-4 minutes, the lift still did not arrive. Therefore she decided to take the stairs instead. Madam Chan gave evidence that she was carrying some green books, some blue books and also some brown books, totally over 100 books. While walking down the stairs, Madam Chan said she looked to avoid the sand on the steps. Having reached the 2/F, Madam Chan continued to walk down the stairs and before getting onto the landing between the 1/F and 2/F, she slipped and fell due to sand on the Stairs. As a result, she slipped down 10 steps and landed on her buttocks near the bottom of the Stairs.
5. After the fall, Madam Chan yelled for help and after no one came after 10 yells or so, she called for Ann’s name. Shortly afterwards, Ann arrived. Upon seeing what had happened to Madam Chan, Ann went back to get Wu Si-ling (“Wu”) and an ambulance was called. While waiting for the ambulance, Ann, Wu and Headmaster Kwan were all at the stairs by Madam Chan’s side. Headmaster Kwan chatted with Madam Chan while waiting for the ambulance but Madam Chan did not inform headmaster Kwan that she had fell because of sand on the Stairs. Madam Chan was then accompanied by Ann to the hospital, and during hospitalization, Wu had paid visits, but again, Madam Chan did not inform Wu that her fall was due to sand on the Stairs. It was not until two years later, in 2007, that Madam Chan told anyone that her fall was caused by the sand on the Stairs.
6. Madam Chan stressed that though she did not actually see any construction work going on within the school area on the day, she recalled there were loud sounds generated by pneumatic drills. Hence after the fall, no one came to her immediate rescue as the noise was so loud that no one was able to hear her yells for help initially.

##### *Defendants’ evidence*

1. The Defendants called nine witnesses. All the Defence witnesses testified to the effect that no sand should have been on the steps at the material time, either because they had inspected the steps and saw none there, or there were no construction works at during those times which would have caused any sand on the steps.
2. Wu gave evidence that during summer holidays, the documents for the teachers were usually kept in large envelopes in the general office instead of taken to the staffroom. Particularly, during early August 2005, while demolition works were taking place in the staffroom, desks in the staffroom were moved and covered with plastic sheets.
3. On 5th August 2005, when Wu attended work and took the stairs from the ground floor to the 1/F, he said he did not notice any sand on the steps. Further, after the accident, Wu, upon Kwan’s suggestions, went along with Kwan and Ng Kam-fai (“Ng”) to check the condition of the Stairs and found no sand.
4. Further, Wu gave evidence that after the accident, he and Ann moved the books back to the general office and counted the number of books that had been scattered on the Stairs. He testified that there were 73 books (blue and green, but no brown books as Madam Chan alleged) and they weighed a total of about 4kg.
5. The Defendants’ next witness was Kwan. Kwan is an independent witness as he no longer works at the School or for the Defendants and has no personal interest in the outcome of this litigation. He testified that after the accident, he went to check the situation of the Stairs along with Wu and Ng, and found that there was no sand, debris or water. Further, although not in his witness statement, Kwan also testified in Court that on 3rd August 2005, he, along with Wu Hon-ching (WHC) and Ng, went to check the completed demolition work in the 3/F staffroom. At that time, the wall had already been demolished, the flooring was fixed and the construction materials and debris were cleared.
6. Ng was the Defendants’ third witness. Immediately after the accident, Ng was informed by Wu about the accident and he attended to Madam Chan, inquiring about her body condition while waiting for the ambulance. After Madam Chan was taken away in the ambulance, Ng, along with Wu and Kwan inspected the Stairs. Ng testified that they only observed the few steps close to the podium and did not actually walk up to the 2/F. The steps they inspected did not have any sand on them.
7. The Defendants’ fourth witness was Chung Lai-fung (“Chung”). She was one of the cleaning ladies at the School and she testified that she, as always, had swept the floor and stairs of the School before 9:30am on the date of the accident.
8. Ann, who was the first person to arrive at the scene after the accident was the fifth defence witness. Like Kwan, Ann is an independent witness as she no longer works for the School. She testified that upon the arrival of the ambulance personnel, she saw them take off Madam Chan’s shoes and cut-off her socks. As such, she was able to clearly see that her shoes were clean and free from any sand. She also gave evidence that the area around the Stairs were clean and free from sand. Further, similar to Wu’s evidence, Ann testified that there were only blue and green books, and no brown books scattered around the Stairs. These green and blue books were later counted together by both Ann and Wu in the general office.
9. The next defence witness was Wong Lee-kwong (“Wong”), who owned the company responsible for the demolition works in the 3/F staffroom. Wong too, is an independent witness. Although Wong did not have any documents to help trigger his memory, he testified that he was certain the demolition work was completed in 2 days and that it began in early August, definitely before the 4th August. He also gave evidence that the demolition work did not involve any pneumatic drill or jackhammer, and that the debris was moved away using a trolley, via the lift, by the evening on the first day of the demolition work.
10. Wu Hon-ching (“WHC”), the next defence witness, was an employee of the school and was responsible for, among other duties, overseeing the construction work at the School during the summer of August 2005. He testified that the demolition work in the 3/F staffroom was completed on 2nd August 2005. He was clear about this since he began taking leave on 4th August 2005, and prior to taking leave, the work had been completed and he accompanied Ng and Kwan to inspect the completed work. He also testified that the demolition work took 2 days and that on both days, the workers borrowed a broom from him to clean the staffroom floor. On 2nd August 2005, WHC personally cleaned the floor once more before accompanying Ng and Kwan to inspect the completed work.
11. The eighth defence witness was Tam Yuk Kwong (“Tam”), who was the Clerk of Works of the management company engaged by the Housing Authority to manage the construction work of the School during the summer of 2005. He testified that between 1st August and 5th August 2005, the works that concerned him were the laying of floor tiles, the fencing of the basketball court, and work concerning the TPA building, all of which were not inside the school building. He based such evidence on a document titled ‘critical events record’ which was documented in or about the time the corresponding event took place, by him and/or Choi Wing-wo (“Choi”).
12. The next witness, Choi was the Assistant Clerk of Works of the management company engaged by the Housing Authority to manage the construction work of the School during the summer of 2005. His evidence is similar to that of Tam’s.

Discussion

1. This case falls entirely upon the credibility of the witnesses. Madam Chan gave evidence that despite her walking carefully down the Stairs, she suffered the fall only because of the sand on the Stairs. As to how the sand appeared on the Stairs, Counsel for the Plaintiff suggested that it could have been brought about by the various construction works within the school and also could possibly have been brought by wind via an opened window near the Stairs. Madam Chan gave evidence that she had visited the 3/F staffroom upon the instructions of Kwan prior to going to the 4/F storeroom. At the time, the desks in the staffroom were rearranged and covered with plastic sheets. It appears to have been unlikely that Kwan would have asked Madam Chan to deliver mail to the staffroom under those conditions given that there were special arrangements regarding mail during the summer months as testified by Wu and Madam Chan herself. Further, Kwan testified that on the material day, he did not instruct Madam Chan to deliver mail to the 3/F staffroom. In this respect, I am of the view that Madam Chan did not enter the staffroom prior to going to the storeroom, and thus could not have picked up sand from the 3/F staffroom, had there been any.
2. As to the number of books Madam Chan was carrying at the material time, she and the Defendants presented conflicting accounts. Madam Chan said that she was carrying blue, green and brown books, totalling over 100 books. On the other hand, Ann and Wu testified that there were 73 blue and green books, and no brown books at all. In this regard, I prefer the evidence of Ann and Wu. They both testified unequivocally that there were no brown books present at the stairs and that they had correctly counted the number of blue and green books.
3. I find that all defence witnesses are truthful witnesses, particularly those who are independent witnesses. Ann, who was the first one to arrive at the scene of the accident, gave unequivocal evidence that the Stairs were clean and that Madam Chan’s shoes were also clean and free from sand. From her testimony and demeanour in Court, I find her to be a reliable witness. As for Wong, Tam and Choi, although they are unable to testify as to the cleanliness of the Stairs on the material day, they were all able to confirm that no construction work was taking place inside the School on 5th August 2005. Kwan, Ng and WHC were also able to confirm that the 3/F staffroom demolition work had already been completed prior to 5th August 2005. Further, Chung also testified that she had swept the Stairs prior to 9:30am on the material day.
4. Having considered the oral testimonies of the defence witnesses, I do not accept the Plaintiff’s allegation that she slipped on sand while climbing down the Stairs. I am of the view that there was no sand on the Stairs at the material time, or at least, not in the quantity or manner as alleged by Madam Chan which caused the accident.
5. For the aforesaid reasons, in my judgment, the Plaintiff has failed, on the balance of probabilities, to discharge the burden of proving that there was an accident which happened in the way as described by her.

*Was the accident nevertheless caused by the negligence of the Defendants?*

1. Having found that the accident was not caused by sand on the Stairs, I am of the view that the Defendants should not be held liable under common law or Occupiers Liability Ordinance. As for whether a safe system of work has been provided under the Occupational Safety and Health Ordinance, it was submitted by the Plaintiff’s counsel that his only contention in regard to a safe system of work is the cleanliness of the workplace and not whether there was a safe system in place in regard to the carrying of heavy load by the Plaintiff. As I have already found that no sand was present on the Stairs at the material time, the Plaintiff is not able to establish any breach of duty on the part of the Defendants to provide a safe system of work. Therefore I find that the Defendants are not liable under the Occupational Safety and Health Ordinance.

Quantum

1. In case I am wrong on the issue of liability, I will progress to addressing the issue of quantum.

PSLA

1. Counsel for the Plaintiff submitted that PSLA of $180,000 would be a reasonable assessment, while counsel for the Defendants contended that the award should be $100,000 (both figures having taken into account the Plaintiff’s pre-existing condition).
2. According to Dr. David Cheng’s (“Dr. Cheng”) expert report, which the Plaintiff did not seek to dispute by cross-examining Dr. Cheng, Madam Chan was diagnosed as having a “contusion of the back” as a result of the accident. Further, it is Madam Chan’s own evidence the she had previously suffered a long history of back pain. From the medical documents of Caritas Medical Centre dated 5 March 2007, in 2001 she was diagnosed with “right cardiovascular accident and spondylolysis of L5”. Her back pain was then “treated conservatively with rigid lumbar corset.” Further, Madam Chan also gave evidence that she did suffer previously from back pains and there were times when the pains were so severe that she had to use a walking stick. After the accident, the Plaintiff was diagnosed with “lower back pain from lumbar spine degenerative changes at L4/5 spinal stenosis” (the said Medical Report by Caritas Medical Centre). As such and according to Dr. Cheng’s analysis, Madam Chan’s “contusion happened to a back with pre-existing degeneration, to an individual with some general weakness due to a cardiovascular condition and the symptoms were aggravated” (Comments, para 4).
3. Dr. Cheng also noted that there were little positive objective signs and he found it difficult to explain Madam Chan’s symptoms, especially the severity of the nature, on orthopaedic grounds. Further, I note that doctors at Caritas Medical Centre indicated that Madam Chan exhibited symptoms exaggeration and inappropriate illness behaviour and failed 65% of her validity criteria in relation to occupational therapy.
4. Taking into account the aforesaid and having carefully considered counsel’s submissions and the cases cited by them, in my judgment, the appropriate award in this case for PSLA is $100,000.00

Loss of Earnings

1. It is undisputed that Madam Chan was paid her full salary from the date of the accident until 31 August 2008. As such, counsel for the Plaintiff rightly elected not to pursue the claim for loss of earnings from the time of the accident up to her termination on 31 August 2008.
2. Dr. Cheng opined that Madam Chan can resume her pre-accident job, and that there is likely to be a diminished efficiency, and certain job arrangements may be needed. However, due to her termination at the end of the 2008 school year, Madam Chan did not return to her pre-accident job and has been unemployed since.
3. Counsel for the Plaintiff submitted that the Plaintiff’s current residual earning capacity is $6,000/ month. However, this figure is unsupported by any statistics. In the absence of any statistical evidence, I am unable to be satisfied that the Plaintiff will now only be able to earn $6000/month. Other than her assertion, the Plaintiff also failed to show her efforts in looking for a job in the pre-trial period, or that she failed to secure or maintain in gainful employment owing to her extant medical conditions.
4. In the premises, I do not find that the Plaintiff should be awarded any damages for loss of income, pre-trial or post-trial.

Loss of Earning Capacity

1. The Plaintiff claimed 6 months earnings assessed at $6000 per month for the award of Loss of Earning Capacity. Given the diminished efficiency of the Plaintiff, I accept that an award of Loss of Earning Capacity is in order. As I have already found that the figure of residual earning capacity at $6000 per month is no better than a figure plugged in the air, I would assess this award by reference to her pre-accident earning, i.e. $9870 per month (including MPF contribution). Hence the award should be $59220.

Special Damages

1. On special damages, I am satisfied on the evidence and supported receipts that medical expenses of HK$23685 and RMB 5653.25 should be awarded.
2. As to the claim under tonic food, although the claim was largely supported by receipts, there was no evidence that the tonic food was taken on proper medical advice. There was also an absent of evidence from Madam Chan as to why she had incurred these expenses. In *Yu Ki v. Chin Kit-lam* [1981] HKLR 419, a case relied on by both the Plaintiff and the Defendants, it was held that in the absence of supporting evidence as to the advisability and suitability of nourishing food, a nominal sum for nourishing food will be allowed. As such, I award $5,000 under this head.
3. Although travelling expenses are not substantiated by any receipts, which is normal and usual, I allow the travelling expenses at the sum claimed at $8,030.50.
4. Therefore special damages would come up to a figure of HK$36,715.5 and RMB 5,653.25.
5. In so far as contributory negligence goes, Madam Chan testified that although hand rails were available on both sides of the stairs, she did not use them as both her hands were occupied with carrying the books. Additionally, Madam Chan gave evidence that trolleys and the lift were available for her use, however, she chose not to use them.
6. Further, Madam Chan must also have known of her own back condition and should not therefore have attempted to carry the heavy load while taking the stairs. In so doing, she was herself contributorily negligent in that she failed to take care of her own safety or well being with such knowledge of her own condition.
7. The Defence witnesses also testified that they knew of Madam Chan’s previous back condition and therefore had specifically made known to Madam Chan to either use the trolley or ask other colleagues for help when carrying heavy loads. Moreover they also testified that there was no immediate need for the books to be moved from the storeroom to the office. There appears to be no reason why Madam Chan did not ask for help, or did not wait until a later day to move the books. It was unnecessary for her to have used the stairs to move those books on that particular day.
8. In the premises, I accept the Defendants’ submissions and find that Madam Chan should bear 60% of the responsibility for the happening of the accident.

*Summary*

1. My assessment of damages is as follows:
   1. PSLA $100,000.00
   2. Loss of Earnings nil
   3. Loss of Earning Capacity $   59,220.00
   4. Special damages $ 42,934.00

($36,715.5 + RMB 5.653.25 [@$1.1])

* + 1. Less 60% contributory negligence ($121,292.40)

$ 80,861.60

* + 1. Less EC compensation received ($ 53,000.00)

Total: $ 27,861.60

1. If Madam Chan succeeds on liability, there will be interest on any award of PSLA at the rate of 2% per annual from the date of the writ to the date of judgment, and on the award of special damages at half the judgment rate from the date of the accident to the date of judgment.

Costs

1. In view of my judgment on liability, Madam Chan’s claims in this action are dismissed.
2. I also make an order *nisi* that the Defendants’ costs of this action should be borne by the Plaintiff, to be taxed if not agreed; the Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations. The costs order *nisi* shall be made absolute unless any party applies within 14 days of today.

# (Bernard Mak)

Deputy District Judge

Representation:

Mr. Lee Siu Ho instructed by the Legal Aid Department for the Plaintiff.

Mr. Paul Leung instructed by Messrs Li, Kwok Law for the Defendants.