

DCPI 3534/2019

[2023] HKDC 591

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO 3534 OF 2019**

BETWEEN

ZHAO HUIJUN

Plaintiff

and

WILSON PARKING (HOLDINGS) LIMITED

(威信停車場管理(控股)有限公司)

1st Defendant

LINK PROPERTIES LIMITED

(領展物業有限公司)

2nd Defendant

LINK ASSET MANAGEMENT LIMITED

(領展資產管理有限公司)

3rd Defendant

Before: Deputy District Judge Connie Lee in Court

Dates of Hearing: 21-24 March 2023

Date of Judgement: 17 May 2023

JUDGMENT

A. Introduction

1. This action concerns a slip and fall accident which is said to have happened in the small hours of 12 November 2016 at Wo Ming Court Carpark, 9 Ngan O Road, Tsueng Kwan O, Territories (the “Carpark”).

2. At the material time, the plaintiff was employed by the 1st defendant (“D1”) as a security guard working at the Carpark. The 2nd defendant (“D2”) was the owner of the Carpark. D1 was in turn a subcontractor of the 3rd defendant (“D3”) who was the principal contractor responsible for the management of the Carpark.

3. It is the plaintiff’s case that on 12 November 2016 at around 00:25, whilst she was performing patrolling duties inside the Carpark and was walking down a staircase now identified by her as staircase No 1 (the “Staircase”) from the 3rd floor to the 2nd floor of the Carpark, she stepped on something wet and slippery at approximately 3 steps above the staircase landing at the 2nd floor. It is said that she lost her balance and fell forward, landing with her knees and wrists. At the time of the accident, the plaintiff was 48 years old.

4. The plaintiff therefore claims against the defendants for damages in the sum of HK\$1,148,656.55 plus interest¹. The same has already taken into account the employees’ compensation of HK\$314,649.

¹ The figure has been revised as per the updated calculation handed up by the plaintiff’s counsel on 24 March 2023.

5. The defendants dispute the accident occurred in the way pleaded. Upon clarification by the defendants' counsel ie Mr Simon Wong, the defendants are putting forward a positive case that the accident as pleaded is fabricated. This is perhaps why initially, D1 included a counterclaim for the sum of HK\$314,649 together with relevant costs incurred by D1 as well as that paid to the plaintiff. It is said that the same was mistakenly paid out and incurred in the plaintiff's employees' compensation claim in DCEC No 2266/2018 (the "EC Proceedings").

6. There is no serious dispute that in the EC Proceedings, the plaintiff claimed against D1 for employees' compensation in respect of the same accident which is now the subject matter of this very action². By the Order of H H Judge MK Liu dated 9 January 2019³, interlocutory judgment on liability was entered by consent in favour of the plaintiff against D1, leaving compensation to be assessed. Pursuant to the Consent Order dated 8 January 2020,⁴ D1 paid the sum of HK\$314,649 (the "Settlement Sum") as full and final settlement of the plaintiff's claim in the EC Proceedings with credit to be given to the advanced payments in the sum of HK\$114,649. Further, D1 agreed to pay the plaintiff's costs of the EC Proceedings, to be taxed if not agreed. Pursuant to Paragraph 5 of the said Consent Order, upon full payment of the balance of the Settlement Sum and costs, D1 be fully discharged from all liabilities in respect of the plaintiff's claim arising out of the accident on 12 November 2016, except the connecting common law claim in DCPI No 3534 of 2019 ie the action herein.

² [1/322-333]

³ [1/334-336]

⁴ [1/340-341]

7. There is also no dispute that D1 was represented by the same firm of solicitors in the EC Proceedings who is now representing all of the defendants herein.

8. Shortly before the trial was heard before me from 21 March 2023 to 24 March 2023, D1 abandoned its counterclaim.

B. The Parties' Respective Case

9. The plaintiff's case can be briefly summarised as follows:-

- (1) On 12 November 2016 at around 00:25, the plaintiff was performing patrolling duties inside the Carpark.
- (2) Whilst she was walking down the Staircase from the 3rd floor to the 2nd floor, she stepped on something wet and slippery at approximately 3 steps above the staircase landing at the 2nd floor. She lost her balance and fell forward, landing with her knees and wrists. She continued to slide down the stairs until she reached the staircase landing at the 2nd floor (the "Accident").
- (3) After the Accident, she saw the floor surface area near where she slipped was wet. It is said that there were a few slices of poked lemon on the steps and a paper cup near the wall. She believed she stepped on the lemon slice(s) or the wet surface area and slipped and fell.

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(4) After she slipped and fell, she felt that her right wrist, both knees and right ankle was very painful. After resting for a while, she slowly stood up and walked down the Staircase to ground floor. She returned to the office of the Carpark to rest.

(5) She was the only one on duty. Out of fear of being scolded or blamed by her supervisor, she did not immediately report the Accident. She continued to stay on duty until 7 am when her shift ended and her supervisor, ie 黃觀玉 (“Madam Wong”) took over.

(6) After work, she went home to rest. She felt the pain was unbearable and attended the Orthopaedics & Traumatology (“O&T”) Out-patient clinic of St Teresa Hospital (“STH”) for treatment. Physical examination revealed that there was tenderness at right ankle with swelling at peroneal tendon but X-ray revealed no fracture nor dislocation. There was also right wrist tenderness, right knee effusion with limited range-of-movement. She was then admitted on the same day for further care. MRI right knee revealed cartilage loss at lateral facet of patella and she was treated with physiotherapy and intraarticular injection of hyaluronic acid.

(7) Upon being told she had to be admitted for further care, she called Madam Wong to inform her that she had a

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fall and is hospitalized such that she would not be able to go to work and would need to take leave. She did however tell Madam Wong that she fell at the staircase.

(8) She was discharged on 15 November 2016. On the same day, she went to the Carpark with her husband to make a report for injury. According to the plaintiff, Madam Wong told her to write an accident report. As the plaintiff did not know how to write, Madam Wong helped her wrote the same on a piece of paper so that her husband could copy the same onto another piece of paper⁵ as well as the Link Incident Report (領展事件報告)⁶.

10. The plaintiff's case is that the Accident was caused by the defendants' negligence such that the plaintiff had sustained right knee, right wrist, right ankle and psychiatric injuries. It is therefore said that the defendants were in breach of their common law duty of care and/or statutory duty as employer as well as occupier(s).

11. The defendants dispute whether the Accident did in fact occur or occur as described or pleaded by the plaintiff. Whilst D1 has abandoned its counterclaim, the defendants nevertheless maintain that the Accident ie the plaintiff slipped and fell on the Staircase after she stepped on something wet and slippery, is a fabrication. In particular, the defendants are adamant that the plaintiff had first rang Madam Wong on 12 November 2016 that

⁵ [1/266]

⁶ [1/267]

she had a fall when taking transportation or getting on/off the bus on 11 November 2016.

12. Even if the Accident had in fact occurred, the defendants' case is that they should not be held liable for the same. If and insofar as liability is established, the Accident was also caused by or contributed to by the plaintiff's own negligence. At the same time, the defendants also dispute the quantum claimed.

C. Relevant Issues

13. The parties agreed the key issues are:-

- (1) Whether the Accident occurred ie whether the plaintiff slipped and fell on the Staircase as alleged?
- (2) Whether the slip was caused by the alleged wet and slippery substance on the Staircase?
- (3) Whether each of the defendants was liable for the Accident?
- (4) Was there contributory negligence on the part of the plaintiff?
- (5) What is the quantum of damages payable to the plaintiff (if any)?

D. The Viva Voce Evidence

14. The core questions above are mainly questions of fact. It is common ground that there was no eye-witness of the Accident and that there was no CCTV camera installed in the Staircase. Where the defendants seriously dispute the factual accounts pertaining to the Accident put forward by the plaintiff, they will have to be resolved on credibility of the witnesses as found by the court.

15. The approach for the assessment of the credibility of witnesses is trite:-

(1) Contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility.

(2) In deciding whether to accept a witness's account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events.

(3) In determining a witness's credibility, it is also important to have regard to the consistency of the witness's evidence with undisputed or indisputable evidence, and the internal consistency of the witness's evidence, which type of consistency is often tested by

a comparison between the witness's oral testimony and his or her witness statement.

*See: Hui Cheung Fai v Daiwa Development Limited & Ors*⁷

D.1 The Evidence of the plaintiff

16. The plaintiff is the only witness giving evidence for her case.

17. The plaintiff only received education up to year 2 in primary school back in the People's Republic of China (the "PRC"). Save for very simple Chinese, she does not really know how to read or write. She had been a housewife until she moved to Hong Kong in or about 2009. Her Cantonese is not very good and she speaks with a heavy accent of the Chiu Chow dialect.

18. The defendants' counsel made multifarious attacks regarding the credibility and reliability of the plaintiff's evidence. As the plaintiff's counsel fairly acknowledged and I also agree, parts of her evidence are unsatisfactory and confusing. Even having regard to her background and the obvious fact that she is not an articulated nor sophisticated person, I must say some of her evidence was simply unreliable. In particular, when asked whether she picked up the lemon slices after the Accident, her explanations including that she took a detour to the washroom in East Point City with the lemon slices such that the same could be thrown in a bin

⁷ HCA 1734/2009 (unrep) 8.4.2014 at §§77-79.

located there were, in my view incredible. The same was never mentioned in her witness statement and was subsequently retracted.

19. There were other instances where the plaintiff would always give a quick answer and then when being pressed would either retract the same or simply say her mind was muddled, she could not think or she did not remember. At one point, she even suggested that she had never been to a public hospital nor out-patient clinic in Hong Kong before the Accident. When it was put to her that she used to go to an out-patient clinic in Ngau Tau Kok, she again said she did not remember (以前嘅事我唔記得).

20. However, that does not mean the entirety of the plaintiff's evidence should be rejected. Indeed, the credit of a witness in matters not germane to the litigation was of less assistance and that the demeanor of a witness was on the whole not a reliable pointer to a witness's honesty: *Northampton Borough Council v Cardoza & ors*⁸. Even lies themselves do not mean necessarily that the entirety of a witness's evidence is to be rejected. A witness may lie in a stupid attempt to bolster his case, but the actual case nevertheless remains good irrespective of the lie: *Macau First Universal International Limited v Ding Xiao Hong & Ors*⁹. In short, where the plaintiff's evidence or explanation on the central issues was supported by documentary or other evidence or findings, I shall give weight and accept the same.

⁸ [2019] EWHC 26 (CH) at §39.

⁹ HCA 992/2010 (uinrep 20.8.2014 at §52.

21. As the plaintiff's evidence was material to the key issues or questions, I shall deal with the relevant parts of her evidence when I come to the analysis of the key issues below.

D.2 The Evidence of the defendants' Witnesses

22. The defendants called Madam Wong and a Madam Yip Suk Man ("Madam Yip") to give evidence at the trial.

23. A Mr Wong Wai Lun ("Mr Wong") also prepared witness statement(s) but he had left employment with D1 and was not called to testify. His witness statement(s) were accordingly expunged from the trial bundles and I had never read nor considered the same.

24. Madam Wong is an employee of D1. At the material time, she was the immediate supervisor of the Plaintiff working at the Carpark (ie SUP 車場主管). Her evidence mainly concerned the followings:-

- (1) On 12 November 2016, she had three telephone conversation with the plaintiff. First, at around 2:30 pm, the plaintiff rang her to inform her that she had a fall when taking transportation (乘車時跌倒腳部受傷) and was waiting to see doctor. Second, 30 minutes later, the plaintiff rang her again and put forward another version ie she fell on the stairs whilst she was patrolling in the Carpark. Third, at around 6 pm, the plaintiff rang her again to inform her that she was admitted to the hospital for a few days.

(2) After receiving the first call from the plaintiff, Madam Wong reported the same to Mr Wong ie the manager of the Carpark at the time, to see if she need to make or fill in a report. Mr Wong indicated that since the plaintiff was not injured whilst she was at work, it was not necessary to do so. She also subsequently reported to Mr Wong that the plaintiff had changed her version.

(3) On or about 15 November 2016, Madam Wong recalled seeing the plaintiff and her husband attending the Carpark intending to make a report for her injury (向威信呈報工傷). As she was about to leave after work, Madam Yip was asked to deal with the same. As such, Madam Wong did not write anything including helping the plaintiff to write how the Accident occurred on a piece of paper so that the plaintiff's husband could copy the same.

(4) Madam Wong also did not tell the plaintiff the staircase which the Accident occurred was staircase No 1 (一號樓梯). In fact, she was not aware that the staircases at the Carpark were numbered.

25. Madam Wong also prepared a supplemental witness statement which contained one short paragraph. Her evidence was that she had been in the employment with D1 for over 10 years and D2 and/or D3

had always arranged cleaners to provide cleaning service in the Carpark from 8 am to 10 am on a daily basis.

26. The material parts of Madam Wong's evidence were clearly in direct conflict with the version of events put forward by the plaintiff. The defendants' counsel is adamant that I should accept the evidence of Madam Wong. It is said that there was no conceivable motive for Madam Wong to lie and there was no suggestion of personal grudges as between her and the plaintiff. I agree with the plaintiff's counsel that there may be many reasons why a witness was not telling the truth. In many cases, the court may never find out the true motive for a witness to do so. I shall therefore focus on evaluating the witnesses' evidence in determining the probability of the competing versions and shall reject the version which I find improbable and/or otherwise incredible or unreliable.

27. The material parts of Madam Wong's evidence were incredible or unreliable. If Madam Wong's evidence regarding the three telephone conversations with the plaintiff was indeed true, her response (or rather, the complete lack of response) was very odd and could not be properly explained. The only explanation she managed to come up with under cross-examination was that she simply did not think of the two different versions put forward by the plaintiff within half an hour and she did not think of asking her the reason why she first claimed she fell when taking transportation. She never saw the need or urge to confront or even ask the plaintiff as to the two versions even on the day when she came to the Carpark with her husband. This simply does not sit well with common sense and is against human nature.

28. After all, she had been in the employment with D1 for over 10 years. Her failure to make any record and the absence of any discussion with Mr Wong regarding the contradictory versions of the accident put forward by the plaintiff is most unbelievable. It is even more unbelievable that when she reported the latest version of the accident put forward by the plaintiff to Mr Wong, Mr Wong still told her it was not necessary to report as the injury took place outside (出面整親唔駛落簿). This part of the evidence was not mentioned in her witness statement and her explanation was that it was too long ago and she did not remember the details. This puts the veracity of her evidence including that she remembered the date, the time and contents of each of the phone calls she had with the plaintiff on 12 November 2016 in the absence of any record at the time when she prepared her witness statement in 2020 (ie almost 4 years after the date of such events) in serious doubt. In particular, Mr Wong did eventually prepare an Incident Report dated 30 December 2016¹⁰ reporting the plaintiff had an accident at staircase No 1 in the Carpark (和明停車場一號梯) on 12 November 2016 at around 00:25. When asked about this Incident Report, she could not provide an explanation. She simply said that this was done by the manager (ie Mr. Wong) without the need to discuss with her and she did not think of why and whether Mr Wong was hiding the genuine version of the accident.

29. Madam Wong's complete lack of interest and/or indifference also appear to be disingenuous. She initially claimed that she did not know the purpose of the plaintiff coming to the Carpark on 15 November 2016. This is of course contradicted by what she stated in her witness statement.¹¹

¹⁰ [1/269-270]

¹¹ [1/122/§7]

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B She subsequently retracted and agreed that she knew the plaintiff came to
C report the Accident (報工傷) but she did not care (無理會). This is so
D notwithstanding she had to accept it would be wrong for the plaintiff to
E report the Accident with D1 given what the plaintiff first said about how
F she fell during the phone call at 2:30 pm on 12 November 2016. When
G asked why she did not read the Link Incident Report¹² after she returned to
H work on 16 November 2016, her initial explanation was that it was given
I to the manager (ie Mr. Wong) as it had to be passed to the manager within
J 8 hours and the Carpark office did not keep the same. However, she had
K to accept the Link Incident Report was sent to the manager by fax such that
L the actual document would remain in the Carpark office to which she had
M access to. At the end, she resorted to her standard explanation that she had
N no responsibility nor interest to read it.
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30. Madam Yip is also an employee of D1. At the material time
she was also a security guard working in the Carpark. Her evidence mainly
related to how she handled the matter and the filling of the Link Incident
Report¹³ when the plaintiff and her husband came to the Carpark on 15
November 2016. Her evidence was that she handed the blank Link Incident
Report for the plaintiff to fill in and her husband helped her to fill in the
same. She was adamant that she did not write on a piece of paper as to
how the Accident occurred for the plaintiff's husband to copy and she did
not fill in the Link Incident Report.

31. I accept Madam Yip is an honest and reliable witness. Her
evidence is forthcoming. Under cross-examination, she frankly accepted

¹² [1/267]

¹³ *Ditto.*

that she did not remember much of the details but Madam Wong did not immediately leave the scene on 15 November 2016. She also twice confirmed the plaintiff and her husband had never opened the drawer in which the chop with the Chinese name “和明苑停車場” (the “Chop”) appearing on the piece of paper with the description of the accident written by the plaintiff’s husband (the “Handwritten Note”)¹⁴ and the Link Incident Report¹⁵ were placed and the Chop was still in that drawer after they left. It was Madam Yip who used the Chop on the Link Incident Report¹⁶

32. I shall deal with the other pertinent parts of the evidence of Madam Wong and Madam Yip when I come to the analysis of the key issues below.

D.3 The Evidence of the Experts

33. The plaintiff and the defendants obtained the following joint medical reports:-

- (1) The joint medical report prepared by Dr Ko Put Shui Peter (“Dr Ko” ie the plaintiff’s orthopaedic expert) and Dr Ho Ching Lun Henry (“Dr Ho” ie the defendants’ orthopaedic expert) on 6 August 2020 (“JMR”)¹⁷;

¹⁴ [1/266]

¹⁵ [1/267]

¹⁶ *Ditto.*

¹⁷ [1/177-209]

(2) The joint supplemental medical report prepared by Dr Ko and Dr Ho on 22 July 2021 (the “JSMR”)¹⁸;

(3) The joint psychiatric report prepared by Dr Wong Yee Him (“Dr Wong” ie the plaintiff’s psychiatric expert) and Dr Hung Bing Kei Gabriel (“Dr Hung” ie the defendants’ psychiatric expert) on 22 November 2020 (the “JPR”)¹⁹.

34. The parties agreed that the JMR, JSMR and JPR should be adduced at trial without calling the makers thereof²⁰. The experts’ qualifications are not challenged. I shall deal with their evidence when I come to deal with the issue of quantum below.

E. Analysis of The Relevant Issues

E.1 Whether the Accident occurred ie whether the plaintiff slipped and fell on the Staircase as alleged

35. On the basis that the defendants maintain the Accident was a fabrication, the plaintiff raised a preliminary objection that D1 is not entitled to put forward a version which is inconsistent with the consent judgment entered in the EC Proceedings. In short, the doctrine of *res judicata* shall apply.

¹⁸ [1/210-215]

¹⁹ [1/216-261]

²⁰ [1/84]

36. The parties agreed that the doctrine shall only operate against D1 but not D2 and D3. In any event, based on my finding of fact pertaining to the first key issue, the operation of doctrine does not have a material bearing on the outcome of this trial. I shall therefore only briefly deal with the same.

37. In my view, the doctrine applies herein to bar D1 from disputing the occurrence of the Accident in the way it is inconsistent with the consent judgment entered in the EC Proceedings.

38. First, it is accepted that *res judicata* applies to not only judgments considered and decided by the court, but also consent judgments. Questions which were really involved in the action resulting in a judgment by consent could not be fought over again in a subsequent action: *Mohammad Bashir v Kam Hoi International Industrial Limited & Ors*²¹

39. Second, in the Form 1 Application of the EC Proceedings, the occurrence of the Accident was expressly stated: “在 2016 年 11 月 12 日於零晨 12:25 分發生，我是保安員工作，當日我巡場到一號樓梯，因地下有水我在樓梯間跌倒。”²² On the basis that interlocutory judgment on liability was entered into by consent²³ and subsequently the Settlement Sum was also paid by consent²⁴, the doctrine of *res judicata* clearly operates to bar, at the very least, D1 from putting forward a case that the Accident was fabricated and/or that it did not occur in the way as set out in the Form 1 Application.

²¹ DCPI 401/2006 (Unrep.) 6.2.2009 at §§39-40.

²² [1/322]

²³ [1/334-336]

²⁴ [1/340-341]

40. In other words, save that D1 was entitled to dispute the circumstances against which the Accident had occurred to the extent that the plaintiff's case on liability and/or quantum was controversial, it is not permissible for D1 to dispute the Accident had occurred in the Staircase on that very day and at that time in the circumstances set out in Form 1: *Tam Choi Ling v Kidsworld International Limited*;²⁵ *Cf Amjad v Wong Yui Cheong*²⁶.

41. Third, in seeking to persuade me otherwise, D1 relied on a pleading point, namely the same was not pleaded because the plaintiff only raised the same in the Defence to D1's Counterclaim. As no separate reply was filed and as D1 had abandoned its counterclaim, there was no pleaded live issue of estoppel or *res judicata*. This technical objection could not even get off the ground. In particular, D1 knew at all material times that the plaintiff would be relying on the consent judgment in the EC Proceedings. Estoppel and the doctrine of *res judicata* was expressly pleaded in the Defence to Counterclaim. Where it was D1 who chose to withdraw or abandon its Counterclaim shortly before the trial commenced, it is disingenuous to even suggest the same was not pleaded and/or estoppel was not a live issue.

42. In any event, having regard to the evidence and the finding of facts in this case, I am not satisfied that the Accident was a fabrication. I am satisfied that on a balance of probabilities, the plaintiff had slipped and fell on the Staircase on 12 November 2016 at around 00:25.

²⁵ [2020] HKDC 356 at §§18-21.

²⁶ HCPI 943/2007 (unrep) 21.4.2011 at §§7-9.

43. As the defendants are putting forward a case of fabrication, they have not put forward a positive case of how the Accident happened although there is a suggestion that the plaintiff had a fall when taking transportation or getting on/off the bus.

44. Whilst parts of the plaintiff's evidence were unclear and/or unreliable, her evidence was clear and remained unshaken on the central issue that she slipped and fell on the Staircase on the very day at the very time as pleaded. The same is corroborated by and/or consistent with other evidence and contemporaneous documents.

45. First, the contemporaneous medical records and the diagnosis at the O&T Out-patient clinic of STH on 12 November 2016²⁷ revealed the plaintiff had a "slip and fall" with tenderness and swelling. She was also admitted on the same day for further care. MRI right knee also revealed cartilage loss at lateral facet of patella. The injuries and treatment were by and large consistent with a slip and fall accident. This is also supported by other contemporaneous medical examinations and/or records.²⁸

46. Second, the plaintiff's account of the Accident taking place at the Staircase on 12 November 2016 at around 00:25 was featured in the Link Incident Report²⁹ and 跟進事項、事件簿³⁰. More importantly, it was also featured in the D1's Incident Report prepared by Mr Wong³¹. There

²⁷ [1/142]

²⁸ [1/143-176]

²⁹ [1/267]

³⁰ [1/268]

³¹ [1/269]

is no explanation let alone good explanation as to why Mr Wong would have prepared or endorsed such a report and D1 had never sought to correct such record. In particular, this has to be viewed against (1) Madam Wong's evidence that she had informed Mr Wong that the plaintiff had changed her version of the accident on 12 November 2016; and (2) D1 must have known such a record would be used in the EC Proceedings.

47. Third, turning to Madam Wong's evidence on the three telephone conversations she had with the plaintiff on 12 November 2016 which pointed to the plaintiff changing the version of her accident, I already explained why this part of her evidence was incredible and unreliable. Her evidence was that the plaintiff had first informed her that she had an accident taking transportation was a bare assertion. The same was wholly unsupported by any contemporaneous record kept by D1. Rather, the same was contradicted by the defendants' own records including D1's Incident Report³².

48. Fourth, the Handwritten Note³³ is also consistent with the plaintiff's description of the Accident. Whilst the defendants made a huge song and dance over the plaintiff's change of assertion as to who actually prepared this document and the failure to call the plaintiff's husband to give evidence, this is beside the point. There is no dispute that the Chop and Mr Wong's mobile phone number appeared on the Handwritten Note. Regardless of who actually prepared the same and whether the same was only prepared after Madam Wong first provided a draft for the plaintiff's husband to copy, it remains the case that either Madam Wong and/or Mr

³² *Ditto.*

³³ [1/266]

Wong, hence D1, must have endorsed or agreed to the same ie the Accident took place on 12 November 2016 at 00:25 at the Staircase. This is consistent with the salient evidence summarised below:-

(1) Madam Yip's evidence that the plaintiff and her husband had never opened the drawer in which the Chop was placed and she would not be able to rule out prior to Madam Wong leaving the Carpark on 15 November 2016, Madam Wong had some conversations or written something with the plaintiff and her husband (ie 啊王同原告人有無做過啲乜或寫過啲乜你唔會記得).

(2) There is no suggestion that the plaintiff who had only been at work in the Carpark for a week or so before the Accident would know Mr Wong's mobile phone number. Even Madam Yip herself did not know Mr Wong's mobile phone number but Madam Wong should have known as she had to directly liaise with Mr Wong.

49. In other words, someone from D1 other than the plaintiff or her husband must have applied the Chop and wrote down/provided Mr Wong's mobile phone number to be written down. Against the circumstantial evidence of this case, the irresistible inference is that Madam Wong or someone else from D1 must have seen this Handwritten Note before. More importantly, the description of the Accident was consistent with D1's Incident Report prepared by Mr Wong.

50. Fifth, I should also add that the defendants' reliance on the words “不小心跌倒” appearing on the Handwritten Note³⁴, the Link Incident Report³⁵, 跟進事項、事件簿³⁶ and the words “不慎跌倒、員工巡邏時不小心” appearing on D1's Incident Report, was misplaced. There is no basis to suggest these words would be detrimental to the plaintiff's claim for common law damages. The same have no relevance and materiality on the issue of whether the plaintiff slipped and fell upon stepping on wet and/or slippery substance ie water and/or lemon slices and whether the defendants would have to be liable for the same. All these documents were prepared and/or written by laymen. It is not uncommon for laymen to use these words to describe an accident without applying a legalistic mind. In any event, these words simply have no bearing on who ought to bear the blame for the Accident.

51. Sixth, the defendants also took issue that there was no such staircase known as “staircase no. 1” and the Plaintiff clearly did not know which staircase she fell. Again, this is a red-herring. It matters not that the Plaintiff who had only started working in the Carpark for around a week before the Accident occurred did not know which staircase she fell and/or that the staircases in the Carpark had no formal numbering. The Defendants never took issue as to the location of the Staircase which was identified as the “staircase no. 1” and said to be the scene of the Accident. The same is featured in the Defendants' contemporaneous records referred to above as well as Form 1 of the EC Proceedings³⁷ which D1 had not taken issue at

³⁴ [1/266]

³⁵ [1/267]

³⁶ [1/268]

³⁷ [1/322]

the time. Pertinently, even Mr. Wong referred to a “1 號梯” in D1’s Incident Report³⁸. None of the Defendants’ witnesses was able to explain why Mr. Wong used “1 號梯” if the same could not identify the Staircase. In fact, at one point during cross-examination, Madam Wong did confirm she would call the staircase next to lift number 1 as 一號轆樓梯/1 號外面樓梯.

52. Seventh, the above would have been sufficient to determine the first key issue in favour of the Plaintiff. That being the case, the remaining miscellaneous issues taken by the Defendants to suggest the Accident was fabricated or did not otherwise happen are all irrelevant. The same can be briefly dealt with as follows:-

(1) As referred to above, it is untrue that the plaintiff’s case was a bare assertion not supported by a single piece of contemporaneous supporting evidence. Quite the contrary, it is supported by and is consistent with the defendants’ own records.

(2) I do not agree it can be suggested that the plaintiff was not able to recall the circumstances of the Accident by making a fleeting reference to a record made in English in the Physiotherapy Progress Note on 28 November 2018³⁹ stating “also complained Rt wrist pain, claimed happened at the same time of IOD (ie injury on duty). Cannot remember the exact mechanism of injury”. The

³⁸ [1/270]

³⁹ [2/91]

record was prepared by the physiotherapist. Against that particular context, it is not unusual that a layman with the plaintiff's background could not speak to the so-called mechanism of injury of the right wrist. This cannot in any way be taken to mean the plaintiff could not recall the circumstances of the Accident.

(3) In view of the aforesaid evidence, the fact that the plaintiff had not immediately reported the Accident to D1 or her supervisor ie Madam Wong and/or sought medical treatment and continued to work until the end of her shift do not detract from the case that the Accident did in fact occur. She did seek medical treatment after work on 12 November 2016 and her case was consistent with the contemporaneous medical diagnosis and other records including that of the defendants' documents. The fact that it was only recorded "sprain" as opposed to wound or bruises cannot be seriously taken as a suggestion that the Accident did not occur or did not occur in the way described by the plaintiff.

(4) The other so-called inconsistencies relied upon by the defendants' counsel had already been explained by the plaintiff. The fact that Dr Li of STH recorded the plaintiff suffered an injury on 11 November 2016 (as opposed to the early hours of 12 November 2016⁴⁰ is

⁴⁰ [1/142]

understandable. It is not uncommon for laymen to refer early hours of the same day as “last night (尋晚)”. As for the record of Dr Lo of Ngau Tau Kok GOPC ie “complaining of slip and fall injury at stairs on her way to work”⁴¹, the plaintiff’s explanation was that it was most probably due to miscommunication. She should have said in punti “返工嗰時跌親” which meant “whilst at work” rather than “on her way to work”. Under cross-examination, the plaintiff confirmed her explanations. I find such explanations to be reasonable and I accept the same.

- (5) Finally, the defendants’ counsel also attempted to run a point that the Accident oddly involved a slip but falling forward whereas slips would usually result in a backward fall injuring back, buttock or head. There is no scientific basis nor evidence to suggest that a slip must necessarily result in a backward fall.

E.2 Whether the Slip was caused by the Alleged Wet and Slippery Substance

53. I however do not accept the plaintiff’s belated assertion that she slipped on the lemon slices found on the Staircase.

⁴¹ [1/140]

54. First, this was never mentioned in her Form 1 in the EC Proceedings⁴². The presence of lemon slices was only specifically mentioned for the very first time in the plaintiff's witness statement. According to the plaintiff's own evidence, she knew the Staircase was usually dirty so she already paid special attention but because the lemon slices were hidden by the riser of the steps, she believed she stepped and slipped on the same because she could not see them. If that was the case, the presence of lemon slices must have been something memorable. It does not make sense that this was never mentioned in the Form 1.

55. Second, even according to the plaintiff's witness statement, she was not sure whether she had in fact stepped on the lemon slices or simply the wet surface area (我相信我是踩到那些檸檬或濕滑的地方)⁴³. However, she then went on to describe the lemon slices were hidden by the riser of the steps and she could not see them⁴⁴ but stepped and slipped on the same. Under cross-examination, she purported to give a detailed but convoluted account of how she dealt with the lemon slices immediately after the Accident had occurred. I have already explained this part of her evidence was incredible and unreliable. It would appear to me that her oral evidence on how she dealt with the lemon slices was only given in the witness box with a view to bolster her case.

56. Third, the 5 photographs claimed to be taken in the Carpark in 2018 including the one which purported to show a slice of lemon⁴⁵ did not assist the plaintiff in this respect. The same could not be relied upon

⁴² [1/322]

⁴³ [1/88/§5]

⁴⁴ [1/89/§6]

⁴⁵ [1/99-101]

to support the plaintiff's case that there were lemon slices present on the Staircase at the time of the Accident back in 2016.

57. Although I do not accept the plaintiff's assertion that she stepped on the lemon slices and slipped, it does not mean the Accident did not happen for reasons set out in Section E1 above.

58. Further, having considered the available evidence, I am satisfied that on a balance of probabilities, the slip was caused by wet and slippery substance, namely water.

59. Indeed, the same has been specifically mentioned in the Form 1 in the EC Proceedings⁴⁶ and is consistent with (and in fact included in) a plea of "stepped on something wet and slippery"⁴⁷. The defendants also had sufficient opportunity to defend the claim on this basis.

60. In this respect, I agree with the plaintiff's counsel that water could have caused a person to slip and fall. I do not accept the defendant counsel's suggestion put to the plaintiff that if there was only water on the stairs, the same would not be slippery because the staircase was made of concrete. In fact, the plaintiff was adamant that she slipped and saw the floor was wet. This part of her evidence was consistent and remained unshaken. I have therefore accepted the same.

61. I have already dealt with the defendants' submissions and challenge relying on the words "不小心跌倒" in the Handwritten Note, the

⁴⁶ [1/322]

⁴⁷ [1/10/§3a]

Link Incident Report and 跟進事項、事件簿. These use of these words *per se* has no relevance and materiality and would not necessarily shed light on the cause of the slip and fall.

E.3 Whether the defendants were liable for the Accident

62. The defendants did not seriously dispute that D1 as the employer, owed the plaintiff a duty to take reasonable care for the safety of her as its employee.

63. Likewise, the defendants did not seriously dispute that each of them was an occupier of the Carpark including the Staircase within the meaning of the term under the Occupiers' Liability Ordinance Cap 314. As occupiers, each of the defendants also owed the plaintiff a duty in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

64. It is common ground that the law does not impose an absolute duty on the part of such occupiers. Both parties referred me to the leading authority of *Ward v Tesco*⁴⁸:-

“It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault; and to my mind the judge was right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is, that the defendants knew or should have known that it was a not uncommon occurrence; and that if it should happen, and should not be promptly attended to, it created a serious risk that

⁴⁸ [1976] 11 WLR 810 at 815H-816D

customers would fall and injure themselves. When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers.”

65. I have come to the conclusion that the defendants should be liable for the Accident for the following reasons.

66. First, the existence of wet and/or slippery substance like water on the Staircase was an unusual event and which in the absence of explanation, was more consistent with fault on the part of the defendants rather than the absence of fault.

67. Second, even photo No 3⁴⁹ albeit taken in 2018, showed that wet and/or slippery substance like water or liquid was present on the stairs. The plaintiff’s evidence was that the Staircase was always dirty with cigarette butts. If and insofar as it is necessary, I am of the view that the plaintiff had additionally showed the existence or presence of water or liquid was not uncommon occurrence which the defendants knew or ought to have known.

68. It must be a matter of common sense that the defendants should know or ought to have known that if the same was present and

⁴⁹ [1/100]. The defendants’ counsel did not seriously dispute this photo was taken at the Carpark.

allowed to be left there, it would create a risk that visitors and employees would fall and injure themselves. The defendants should obviously guard against this risk.

69. Third, the defendants had not discharged the evidential burden that there was in place a proper and adequate system to guard against such risk and whether the Accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection.

70. In this respect, the defendants' counsel relied on *Cheung Wai Mei v The Excelsior (Hong Kong) Ltd*⁵⁰ and submitted that what was required was for the defendants to meet the threshold of reasonableness and they could not be expected to remove any spillages if and when they occur. This proposition is of course correct. However, the defendants had not even pleaded they had such a proper and adequate system to meet the threshold of reasonableness.

71. I agree with the plaintiff's counsel that as the same was not even pleaded, the defendants were in principle not entitled to rely on the one-line assertion in Madam Wong's supplemental witness statement⁵¹.

72. More importantly, the one-line assertion without more simply could not show the defendants had discharged their duty of care by maintaining an adequate system. There was no evidence on how the cleaning work was carried out at the Staircase and whether there was a

⁵⁰ CACV 38/2000 (unrep) at §48.

⁵¹ [1/128-2]

system of supervision and/or monitoring on the part of D1 or any of the defendants.

73. In the absence of a positive plea and any evidence in this respect, I do not agree the mere fact that the plaintiff was employed as a security guard and had to patrol the Carpark could amount to sufficient evidence let alone cogent evidence showing Ds had put in place an adequate system to guard against the very risk in question. It was never the defendants' pleaded case and/or evidence that the plaintiff (and/or Madam Wong and Madam Yip) was hired to detect any spillage or wet and slippery substance and had a duty to report the same.

E.4 Was there Contributory Negligence on the Part of the plaintiff

74. The defendants relied on *Pak Sai Ming v JV Fitness Limited*⁵² and contended that the plaintiff was negligent and such contributory negligence should be 60%. I do not agree the facts of the present case are similar to those in *Pak Sai Ming*. The discussion on contributory negligence in this decision (and other decisions relied upon by the defendants) was mere *obiter*. Further, it could not seriously be suggested that the plaintiff was a frequent user who had to use the Staircase 15 to 20 times on each working day and for a several years before the Accident. As a matter of fact, she had only been working in the Carpark for a week before the Accident.

75. There is no suggestion let alone evidence that the plaintiff was patrolling or walking in a quick or hasty pace. The unchallenged evidence

⁵² [2019] HKCFI 2268 at §43.

was that at the time when she was descending the Staircase from the third to second floor, she was holding a number of things like paper and pen whilst patrolling⁵³. In other words, she could not hold on to the handrail.

76. However, 12 November 2016 was not the plaintiff's first day of work. In fact, it is the plaintiff's own evidence that she knew the Staircase was always dirty. There is no suggestion or evidence that the lighting of the Staircase was not satisfactory. I have also explained why I do not accept the plaintiff's evidence that despite having exercised caution, she slipped on the lemon slices as they were hidden by the riser of the steps⁵⁴. All in all, she could have taken more precautions to guard against the risk of a slip and fall.

77. On the aforesaid basis, having regard to relative blameworthiness and causal potency, I am of the view that the plaintiff had a 10% share in the responsibility for the Accident.

E.5 What is the Quantum of Damages

78. In assessing the quantum of damages, the plaintiff's counsel accepted that the court should not take into account the left knee condition⁵⁵. In fact, the plaintiff's counsel accepted that only the following injuries would be relevant:-

- (1) Right knee injury/condition;

⁵³ [1/88/§4]

⁵⁴ [1/89/§6]

⁵⁵ Plaintiff's Opening Submissions at §35

- (2) Right wrist injury/condition;
- (3) Right ankle injury/condition; and
- (4) Psychiatric injury/condition.

79. The parties also agreed that the court has to evaluate the available evidence on an objective basis. I therefore did not place much reliance on the self-reported feelings and/or symptoms alleged by the plaintiff in the witness box. Where the same were not consistent with the conclusions of the experts, I would incline to accept the conclusions of the expert subject to the following caveat. An expert is expected to discuss both the “subjective” and “objective” evidence on an even-handed and fair manner whether such evidence supports the case of those instructing him or not before coming to any conclusion. In particular, the expert should address whether the “objective” evidence supports the “subjective” complaints. What an expert must not do is to “play advocate” by “cherry-picking” evidence which support one side’s case and base his opinion entirely on those without any qualifications: *Li Cheuk Lam v Cheung Sun Tai & Ors.*⁵⁶

80. The opinions of Dr Ko and Dr Ho in respect of the conditions of the plaintiff’s right knee, right wrist and right ankle can be summarised as follows:-

⁵⁶ HCPI 1102/2015 (unrep) 13.10.2017 at §§30-38.

| | Dr Ko's Opinions | Dr Ho's Opinions |
|-------------|--|---|
| Right Knee | Patellar cartilage injury (lateral facet). ⁵⁷ | The injury only involved the soft tissues. There was chronic pre-existing degeneration of both knee joints which should belong to category (iii) ⁵⁸ . He would apportion 90% of her right knee condition to degeneration and 10% to the Accident ⁵⁹ . |
| Right Wrist | Probable TFCC tear or partial tear. ⁶⁰ | The injury only involved the soft tissues ⁶¹ . The findings of suspected TFCC should be unrelated to the Accident. ⁶² |
| Right Ankle | Sprain injury. ⁶³ | Sprain with soft tissue injury ⁶⁴ . |

81. In respect of her physical injuries set out above, Dr Ko was of the view that sick leave period up to around October 2019. Dr Ho was of the view that the appropriate period should be no more than 4 weeks.⁶⁵ Further, Dr Ko was of the view that the degree of impairment for disability was 8% whilst Dr Ho was of the view that the same was 0.1%.⁶⁶

82. Having considered the available records, the opinions and basis for such opinions held by the experts concerning the physical injuries, I would prefer the opinions of Dr Ko generally.

⁵⁷ [1/195]

⁵⁸ [1/196]

⁵⁹ [1/205]

⁶⁰ [1/195]

⁶¹ *Ditto*

⁶² [1/213]

⁶³ [1/195]

⁶⁴ *Ditto*

⁶⁵ [1/202]

⁶⁶ [1/204-205]

83. First, Dr Ko's conclusion on the right knee's condition was consistent with the MRI examination at STH⁶⁷.

84. Second, Dr Ho's opinion that there was chronic pre-existing degeneration of both knees and it should belong to category (iii) was based on the fact that the plaintiff had been referred to the Total Joint Replacement Clinic for total joint replacement and according to the said referral letter, the right side was more severe⁶⁸. I agree with the submission of the plaintiff's counsel that there was no evidence to support his opinion that her present state would certainly have occurred at some stage even if not for the Accident. In particular, the referral was made on 24 June 2020 ie around 3.5 years after the Accident. Where the x-ray taken on 15 June 2020 showed minimal to mild degenerative changes for both knees⁶⁹, it is simply unclear whether the same relating to the right knee could really be taken as a relevant pre-existing condition such that any meaningful apportionment would be necessary.

85. More importantly, it is equally unclear what was the basis for Dr Ho to apportion 90% of the plaintiff's right knee condition to degeneration⁷⁰. No particular explanation let alone justifiable and objective explanation had been proffered.

86. Third, Dr Ko was fair in pointing out that no evidence was found to draw any causal relationship concerning the plaintiff's left knee pain with the Accident.⁷¹

⁶⁷ [1/142]

⁶⁸ [2/3][1/196]

⁶⁹ [1/186]

⁷⁰ [1/205]

⁷¹ [1/200]

87. Fourth, Dr Ko's initial assessment of the condition of the plaintiff's right wrist was confirmed by the MRI examination in 2021. It was only upon seeing the MRI's result that Dr Ho agreed in the JSMR that there was a suspected avulsion of the TFCC but nevertheless then suggested the same was unrelated to the Accident and therefore maintained his opinions in the JMR⁷². The purported explanation appeared to have relied on "cherry-picking" some reports from Ngau Tau Kok GOPC. It was said that the plaintiff only complained of right wrist pain on 18 April 2018 despite having been attending that clinic since 28 November 2016. This is actually untrue. As the defendant's counsel had to accept, the plaintiff did complain about the right wrist pain from time to time including that at the Ngau Tau Kok GOPC in 2017. The same can also be seen from the record of United Christian Hospital on 13 December 2016⁷³.

88. In terms of the plaintiff's psychiatric condition, Dr Wong considered the plaintiff to have suffered from a major depression disorder ("MDD") of mild intensity⁷⁴. On the other hand, Dr Hung considered that the appropriate diagnosis should be Adjustment Disorder.⁷⁵ For sick leave required for the psychiatric condition, Dr Wong recommended granting the plaintiff sick leave period of 3 months from the date of the report, which would take it to 21 December 2021. On the other hand, Dr Hung was of the view that 3 months from the first psychiatric appointment (which took place on 6 September 2018)⁷⁶ would be sufficient⁷⁷.

⁷² [1/213-214]

⁷³ [2/129]. See also: [2/131][2/135][2/137][2/160-162][2/160-162][2/182][2/184-185][2/190][2/298]

⁷⁴ [1/230-233]

⁷⁵ [1/236]

⁷⁶ [1/153]

⁷⁷ [1/244]

89. As submitted by the defendant's counsel and I agree, the difference between the psychiatric experts on diagnosis is not that material. In all circumstances, the experts agreed that the plaintiff is and was suffering from a psychiatric condition and she had no pre-existing mental problem before the Accident⁷⁸. It really does not matter whether it is called a depressive disorder or an adjustment disorder with depressive mood: *Joan Carol Boivin v Wing Kin Yin & Anor*⁷⁹ & *Chu Kwong Fu v Wonder Gold Investment Ltd*⁸⁰.

90. Even according to Dr Hung, the diagnosis of MDD of mild intensity or Adjustment Disorder is determined by whether the plaintiff indeed suffered from the additional symptoms and whether her functioning was actually as she reported at the joint examination⁸¹. Again, this was rather subjective, and I am unable to attach much objective weight on the plaintiff's self-reported feelings and symptoms.

91. Ultimately, I am of the view that the overall physical or orthopaedic condition of the plaintiff especially pertaining to the right knee and right wrist was not as minor as opined by Dr Ho. However, I agree the psychiatric condition of the plaintiff should be mild. I am not satisfied that she could not return to her pre-Accident work.

⁷⁸ [1/239]

⁷⁹ HCPI 195/2000 (unrep) 14.2.2001 at §15.

⁸⁰ HCPI 295/2014 (unrep) 21.5.2015 at §§41-42.

⁸¹ [1/239]

(i) PSLA

92. The parties have cited a number of cases in urging me to derive at a particular figure for PSLA. I should add that these cases are merely general reference. In some of those cases, the injuries and disabilities were more serious than those suffered by the plaintiff, and in other cases they were less serious. After all, no injuries and disabilities can be exactly the same.⁸²

93. Based on the aforesaid and with reference to some of the authorities⁸³ referred to by the parties, I am of the view that an award of HK\$300,000 would have been appropriate for PSLA as a result of both the plaintiff's physical and psychiatric conditions. For reasons mentioned, I am not satisfied that a discount for any pre-existing condition ought to be applied in the present case.

(ii) Pre-Trial Loss of Earnings

94. There is no dispute that the plaintiff's monthly salary was HK\$8,400 at the time of the Accident.

95. The defendants agreed that the plaintiff's salary was adjusted⁸⁴ to:-

- (1) HK\$8,824 as from 1 May 2017;

⁸² *Lee Yau Wai v Yeung Kam Wing* HCPI 281/2009 (unrep) 29.3.2011 at §§70-73.

⁸³ See example: *Cheng Yuk Chun v Winson Cleaning Service Company Limited* DCPI 629/2006 (unrep) 6.7.2007 at §§61-67. *Lee Yau Wai v Yeung Kam Wing* HCPI 281/2009 (unrep) 29.3.2011 at §§70-73; *Rukhsar Begum v Native English Centre Ltd* DCPI 2243/2015 (unrep) 3.4.2017 at §76.

⁸⁴ [1/306][1/302][1/303]

(2) HK\$9,080 as from 1 May 2018;

(3) HK\$9,600 as from 1 May 2019.

96. The plaintiff is claiming pre-trial loss of earnings for a period of 76.3 months⁸⁵. This is even beyond the period of orthopaedic sick leave which was said to be justified according to Dr Ko's opinion (ie up to around October 2019).

97. I am not persuaded by Dr Ko's opinion that a generous period of almost 3 years (which was partly based on medical certificates) was justified. Indeed, medical certificates were no more than a piece of evidence to be evaluated in the light of all available evidence including medical evidence and I should not be bound by the same: *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd*⁸⁶. I also agree it is inappropriate for me to rely on the MAB assessment which was a relatively quick and simply assessment under the statutory regime for employees' compensation calculations.

98. On the other hand, I am of the view that 1 month to a few months orthopaedic sick leave is rather unrealistic. Having considered the available medical evidence including the expert reports, I take the view that a period of 21 months orthopaedic sick leave would be appropriate. By the end of August 2018, the mechanical pain and progress with physiotherapy had become more or less static⁸⁷.

⁸⁵ Revised Statement of Damages at §7.

⁸⁶ [2008] 5 HKLRD 210 at §18.

⁸⁷ See for example, [1/145] [2/234-242]

99. Insofar as the sick leave required for the psychiatric condition, I would prefer and accept Dr Hung's assessment i.e. 3 months as from her first appointment at the psychiatric clinic on 6 September 2018. By December 2018, the plaintiff had reported better sleep⁸⁸. Whilst it is understandable that her mental condition had been fluctuating, her stressors included the subsisting knee pain and ongoing litigation as well as lack of family support.⁸⁹ Where I am satisfied that the knee mechanical pain had become static by then⁹⁰, she should have felt better and could return to work.

100. Based on the aforesaid, the plaintiff's pre-trial loss of earnings should be HK\$222,020.40, ie the aggregate of:-

- (1) HK\$8,400 x 5 months for orthopaedic sick leave x 1.05;
- (2) HK\$8,824 x 12 months for orthopaedic sick leave x 1.05;
- (3) HK\$9,080 x (4 months for orthopaedic sick leave + 3 months for psychiatric sick leave) x 1.05.

(iii) Future Loss of Earnings

101. I am not satisfied that the plaintiff is entitled to any future loss of earnings.

102. First, both orthopaedic experts shared the view that the plaintiff should be able to return to normal duty as a security guard

⁸⁸ [2/263]

⁸⁹ [2/262]

⁹⁰ [2/54]

although Dr Ko took the view that there would be impairment of work efficiency and effectiveness.⁹¹ However, employees do not go to work only when they are 100% fit: *Pak Siu Hin Simon v J V Fitness Limited*⁹².

103. Second, I already explained why I do not accept Dr Wong's opinion that the plaintiff could not return to normal duty as a security guard by reason of her psychiatric condition which should be mild.

(iv) Loss of Earning Capacity

104. The purpose of damages under this head is to compensate the risk that at some future date during the plaintiff's working life, she will lose her employment and will then suffer financial loss because of his disadvantage in the labour market: *Moeliker v A Reyrolle & Co Limited*.⁹³ See also: *Muhammad Asghar v Kwok Kong Moon & Ors*.⁹⁴

105. I accept that there is a real and substantial risk that the plaintiff would suffer a handicap in the labour market as a result of her injuries. I have considered the plaintiff's current age and her low educational background. I have also considered the respective experts' estimated loss of earning capacity which varied from 0% to 12%⁹⁵ on the psychiatric front and 0.1% to 8%⁹⁶ on the orthopaedic front. I am persuaded that the plaintiff would have some impaired capacity including impairment of work

⁹¹ [1/203]

⁹² HCPI 574/2014 (unrep) 15.5.2017 at §77.

⁹³ [1977] 1 WLR 132 at 141B-D

⁹⁴ [2022] HKDC 1184 at §§26-37

⁹⁵ [1/248-249]

⁹⁶ [1/203-204]

efficiency and effectiveness⁹⁷ whether by reason of the physical or psychiatric impairment as a security guard or site worker (場務員).

106. I consider that an award of HK\$25,500 ie 3 months of the plaintiff's monthly earning (ie HK\$8,500)⁹⁸ is appropriate in the circumstances.

(v) Costs of Future Medical Treatment

107. Insofar as the costs of future medical treatment is concerned, one can always expect private sessions are preferable to those offered by the public health care system. Nevertheless, I doubt if the extensive treatment of private psychiatrist and clinical psychologist recommended by Dr Wong⁹⁹ is genuinely necessary.

108. The plaintiff has been and is still receiving both clinical psychology and psychiatric treatment from the Hospital Authority. I am not persuaded that she has a genuine need to resort to extensive private treatment and/or sessions or that the current treatment for the plaintiff is inadequate.

109. In the circumstances, I agree with the defendants' counsel that the award under this head should be no more than HK\$1,000.

⁹⁷ [1/203]

⁹⁸ [1/321-1]

⁹⁹ [1/244-245]

(vi) Special Damages

110. The defendants agreed to the plaintiff's claim of HK\$78,439.

(vii) Summary of Damages Awarded

111. The parties agree that credit should be given to the Settlement Sum as employees' compensation already paid by D1 to the plaintiff.

112. In summary, I would award the following sums as damages to the plaintiff in this case:-

| | | |
|-----|-----------------------------------|----------------|
| (1) | PSLA | HK\$300,000.00 |
| (2) | Pre-trial loss of earnings | HK\$222,020.40 |
| (3) | Future loss of earnings | Nil |
| (4) | Loss of earning capacity | HK\$25,500.00 |
| (5) | Costs of future medical treatment | HK\$1,000.00 |
| (6) | Special Damages | HK\$78,439 |

Sub-Total: HK\$626,959.40

Less: Contributory Negligence (10%) (HK\$62,695.94)

The Settlement Sum (HK\$314,649.00)

Total: HK\$249,614.46

113. Interest on general damages shall be 2% per annum from the date of service of the writ until judgment, and thereafter at judgment rate until full payment. Interest on pre-trial losses and special damages shall be at half of the judgment rate from the date of the Accident to the date of judgment, and thereafter at judgment rate until full payment.

F. Conclusion

114. For the above reasons, I make the following orders:-

- (1) Judgment be entered against the defendants in the sum of HK\$249,614.46 plus interest set out in Paragraph 113 above;
- (2) The 1st defendant's counterclaim be dismissed;
- (3) There be a costs order *nisi* that the defendants shall pay the plaintiff's costs of this action, save that only the 1st defendant shall pay the plaintiff's costs of the counterclaim, including all costs reserved if any, to be taxed if not agreed with certificate for counsel. The plaintiff's own costs be taxed in accordance with the Legal Aid regulations.

115. The costs order *nisi* shall become absolute in the absence of any application to vary the same within 14 days of this Judgment.

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116. It remains for me to thank counsel for their assistance.

(Connie Lee)
Deputy District Judge

Mr Norman Wong, instructed by Szwina Pang, Edward Li & Co. assigned
by the Director of Legal Aid, for the plaintiff

Mr Simon Wong, instructed by Deacons, for the defendants

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