#### DCPI 29/2011

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 29 OF 2011

BETWEEN

FAZAL AHMED Plaintiff

and

MTR CORPORATION LIMITED Defendant

##### Before: His Hon Judge Leung in Court

Date of Hearing: 5-7 March 2012

Date of Judgment: 25 April 2012

## J U D G M E N T

1. The defendant (“**MTR**”) operates the mass transit railway in Hong Kong. The plaintiff (“**Ahmed**”) was a security guard under the employ of the security contractor of MTR. For slip and fall injury sustained in the course of his work in one of the stations of MTR in 2008, Ahmed commenced this action to claim damages. Ahmed has been represented by solicitors until late 2011. He appeared in person at the trial.

***BACKGROUND***

1. Ahmed was employed by Tonwell Security Limited (“**Tonwell**”) as a security guard with effect from 1 October 2006. Tonwell was the security contractor of MTR. Ahmed was assigned to work at the Tsimshatsui MTR Station (“**the Station**”). On 25 February 2008 at about 11:00 pm, while Ahmed was on duty, he slipped and fell on the staircase connecting the concourse and Exit M2 of the Station; and was injured.
2. The claim against MTR is based on negligence and breach of occupier’s liability on the part of MTR. The issues to be determined in the present case are:
3. what caused Ahmed to slip and fall;
4. whether the accident was caused by MTR’s breach of its duty towards Ahmed;
5. whether Ahmed was himself negligent; and
6. if MTR is liable, the quantum of damages.
7. Besides Ahmed, the following witnesses for MTR were called: Shift Station Masters of the Station at the material time, Chan Yui Pui Raymond (“**Chan**”) and Koo Wai Hung (“**Koo**”), as well as the then Station Officer Wong Kin Fai (“**Wong**”).

***LIABILITY***

***What caused Ahmed to slip and fall***

1. According to his pleading, Ahmed slipped and fell because of vomit on the staircase. In court, Ahmed described the substance that caused him to slip was dirty, like oily and wet substance.
2. Koo arrived at the scene upon receipt of the report of the accident. According to him, he discovered some yellowish liquid similar to grease stains left on the staircase where Ahmed had fallen. Wong also found what appeared to be the handle of a broken paper bag there. He then took photographs of the scene.
3. The photographs produced depict what appears to be part of a broken paper bag with a string attached (which might or might not be part of a handle) where the dirty substance and stains were found. The stains straddled across quite a number of steps of the staircase.
4. Whatever the real nature of the substance, it caused the staircase to become wet and slippery; and that, in my judgment, caused Ahmed to slip and fall.

***Whether MTR was in breach***

1. The particulars of negligence and breach of occupier’s duty on the part of MTR are common. As to how and when the substance came to exist on that part of the staircase; and how he came to step on it and therefore slipped and fell, Ahmed made no mention in his statement.
2. Reliance on the maxim of *res ipsa loquitur* was pleaded. But I doubt whether the presence of the slippery substance on the staircase *per se* connotes negligence so as to invoke the operation of the maxim in Ahmed’s favour. Regard must be had to the circumstances surrounding the occurrence of the accident.
3. A CCTV recording of the upper landing of the staircase in question during the relevant time was produced. Besides showing Ahmed who was stationed there, the recording establishes the fact that the staircase was well lit; and those who had used the staircase in question both up to Exit M2 and down to the concourse managed to do so uneventfully. Prior to Ahmed’s accident, there was no sign of anyone slipping. There was certainly no report of any other accident there on that day.
4. The above primary facts permit the inference that the substance came to exist on the part of the staircase in question very shortly prior to Ahmed’s stepping on it. Actually Ahmed also suggested in his submission that the substance might have come to exist on that part of the staircase after all those who were captured in the CCTV recording to have passed up and down it and immediately before he reached there. Ahmed effectively accepted that the time gap might be a small one.
5. The reasonable duty of MTR to ensure the cleanliness and to prevent danger to visitors to its stations arising out of the condition of the premises is not in dispute. In defence, MTR contends that it has already entrusted the daily duty of cleaning of all parts of the Station to competent cleaning contractor. Station staff has also carried out regular patrol and inspection of the state of cleanliness of the Station.
6. As to Ahmed, as a security guard of the security contractor of MTR, he was also responsible for keeping a proper lookout and reporting to the control station any unusual discovery in the course of his duty. One example was the condition of the facilities inside the Station. Ahmed had been on his shift of duty for some time on that day; but there had been no report of unusual discovery prior to his accident.
7. In the circumstances, MTR contends that it could not reasonably be expected to discover the presence of the substance on that part of the staircase at the material time so as to take step to have it removed.
8. What MTR pleaded do not differ materially from one of the circumstances that section 3(4)(b) of the Occupier’s Liability Ordinance stipulates to be relevant:

“where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more an answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.”

1. At the material time, MTR contracted with Best Result Cleaning Services Limited (“**Best Result**”) to provide cleaning services to the station areas. As far as Chan understood, the contracting out of cleaning services had undergone the usual tender procedure before Best Result was selected. According to him, 10 full-time cleaning workers were deployed in the 8-hour shift at the material time. As to the staircase leading to Exit M2, a cleaner would attend there once every 2 hours.
2. Both Best Result and MTR had a system of regular daily inspection at various intervals, the former by its foreman and the latter by the control officer (i.e., Wong) and the shift station masters (i.e., Chan and Koo). Chan and Koo confirmed that in their evidence. According to Wong, he would patrol 2 to 3 times, at the interval of 2 to 3 hours, during his shift. Cleanliness was one of the aspects of inspection during the patrol.
3. Chan added that they would respond to the occasional complaints by passengers about the cleanliness inside the Station. But in most cases, obstructions and accidental spillage were discovered during their routine patrol. MTR also met with the management of Best Result once every 3 months to discuss the latter’s performance and planning in the cleaning service.
4. Of the majority in the Court of Appeal in *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd trading as The Excelsior*, CACV 38/2000 (22 November 2000), Mayo VP had this to say:

“ A deposit of yoghurt on the floor of a supermarket is very different from an accumulation of liquid which no one saw and which could only be inferred to exist as a consequence of a damp patch being found on the plaintiff’s dress.

What steps would it be necessary to take to obviate this risk. It would appear that it would be necessary for staff to be posted at every entrance to the hotel and for them to be equipped with cleaning utensils capable of removing any liquid detected on either the marble or more likely coconut matting at short notice. To state this proposition in this way is to virtually state that the hotel in the present case had an absolute duty to ensure the safety of the plaintiff. Or to put the matter another way all the plaintiff would have to establish is that she slipped and fell and suffered injury for her to recover damages. This is not the law.”

Rogers VP agreed and added:

“……It seems to me that the plaintiff is attempting to put far too high an onus on the defendant not merely to remove any spillages if and when they occur but in terms of stationing people, presumably at all corners of the hotel, at all times, to guard against spillages. The evidence was that there was at least one cleaner on duty that night. In my view that would have been sufficient. Furthermore, in the absence of there being any evidence that anybody, at all, saw any water, moisture or any slippery substance at or near the scene of the accident, it cannot be said that there was a hazard which should have been seen and cleaned before the plaintiff arrived.”

1. It was readily accepted that the Station was a busy station. Indeed, according to Chan, the number of passengers using the Station, excluding pedestrians who merely used the underground passages, amounted to over 100,000 daily in 2008. In a similar context, the learned Judge in *So Yee Ling v MTR Corporation Limited*, DCPI 333/2010 (29 April 2011) had the following observation:

“31. ...... First, one must appreciate that the liability under the (Occupier’s Liability) Ordinance is not a strict one. The Station was a public place accessible by many members of the public. One cannot expect the Defendant to place a worker in every place in the Station to guard against other passengers from spilling water on the ground. What was required from the Defendant was that there had to be a reasonably effective system for getting rid of the danger which might from time to time exist. If the Defendant had subcontracted the cleaning work to an independent contractor as in what happened in the present case, the Defendant had to take reasonable steps to supervise the performance of the cleaning work and to ensure that such work was properly done.

……

36. I have also considered the fact that the Station was a busy station with huge passenger flow, in particular in the busy hour at 9:00 am in the morning. Further, there were also previous incidents of report of water spillage of about 3 to 4 times a month, and passengers injured in “slip-and-fall” accidents of about 1 to 2 times a year. However, the Passenger Concourse is different from other venues such as restaurants where the size of the venue is smaller and the risk of spillage of water or oily substance on the floor is much greater……To require the Defendant to implement a system which can avoid all accidental spillage of water on the ground is simply unrealistic. In my judgment, the measures taken by the Defendant were adequate and reasonable in the circumstances of the case.”

1. I echo what the learned Judge in *So Yee Ling* said above. According to Chan, in his 3 years of experience working with Best Result, he found the contractor to have been co-operative in fulfilling any special requirement in cleaning services in addition to compliance with the service contract. The fact was that there was record of only 3 slip-and-fall incidents in 2007; and Ahmed’s accident was the only one on record in 2008. Disregarding the luck factor, I think the record was fair testament to the effectiveness of the system in place at the material time. The same must be said in respect of the reasonableness of the system in the circumstances.
2. In court, Ahmed challenged the evidential value of the CCTV recording; and suggested for the very first time that there was another camera above the lower landing of the staircase in question closer to the concourse. He suggested that the recording of that other camera should have captured that part of the staircase in question. The whole point of such assertion, according to Ahmed, was that the control station knew what was happening at that part of the staircase *each and every second* of the day, and therefore ought to have noticed the dirty substance and acted accordingly and promptly.
3. In my view, the challenge was not fair. It should be noted that the CCTV recording produced was disclosed by MTR in as early as May 2011. The photographs of the relevant part of the staircase in question were disclosed in July 2011. Had Ahmed taken the view that there existed more relevant CCTV recording for the purpose of resolving the dispute, request for its discovery could have been made. As Ahmed was then legally represented, such request, if intended, would have been made.
4. In any event, whilst the witnesses for MTR agreed that the other camera referred to by Ahmed did exist, Koo in court confirmed, and I accept, that that camera, at its angle, did not actually capture that part of the staircase in question.
5. Applying the principles in the cases cited above, and in view of the very limited duration of the presence of the substance on that part of the staircase, as inferred above, I find that expecting MTR to notice it and to have it cleaned so as to prevent the accident from happening to Ahmed would simply be unreasonable, if not unrealistic.
6. The primary facts established by referring to the CCTV recording permit another inference. Assuming that the substance, whether at one stage with or without what was suspected to a paper bag, had in fact been present on that part of the staircase for more than just a couple of minutes, it must have been sufficiently conspicuous to all those who were seen to have passed along that part of the staircase so that the same could be avoided by them. Ahmed somehow failed to avoid the same when he came to that part of the staircase. That calls for explanation.
7. In court, Ahmed confirmed that by the date of the accident, he had been assigned to work at the Station for months. According to Chan, persons on patrol, including security guards like Ahmed, had the duty to report to the control room the discovery of any spillage; and while waiting for the cleaner to arrive, he should wait at the scene and guard the passenger away from the soiled area. Ahmed admitted in court that as a security guard, he assumed it was part of his duty to report to the control station, should he discover the presence of dirty substance. He had been given the telephone number of the control station specifically for reporting purpose by the use of mobile phone.
8. Ahmed confirmed that he had to take the staircase in question to get to where he was stationed at the time. On his way up, he found the staircase to be clean. As to why he failed to notice on his way down later the presence of the substance on that part of the staircase, particularly if it came together with some kind of paper bag, intact or torn, when he came down the staircase from the exit to the concourse, Ahmed repeated his explanation that he was “*not thinking at that time*”.
9. On balance, I find that Ahmed simply paid no proper attention, if at all, to the staircase when he walked down it. Otherwise, he could have avoided the accident, like all the others who had passed along that part before he did.

***Whether Ahmed was himself negligent***

1. On the basis of the above findings, I find that had Ahmed taken the reasonable care both of himself and in discharge of his duty to keep a proper lookout as the security guard at the material time, he could have avoided the accident.

***Conclusion***

1. MTR is not liable. Even assuming that MTR were somehow liable, there would have been clear contributory negligence on the part of Ahmed in failing to pay attention and to keep a proper lookout of the facilities of the Station, which was very much part of his duty. Mr Sakhrani suggested the degree should be 25%. But I say no more on this, as the projection of contributory negligence in the circumstances of the present case appears to be no more than hypothetical.

***QUANTUM***

1. For completeness, I proceed to assess the quantum of damages that Ahmed would have been entitled to, had he succeeded in establishing MTR’s liability.

***Injuries and treatment***

1. Upon the fall, Ahmed landed on his back and then his neck. He complained of severe pain. Upon admission to the hospital, examination showed tenderness over his back and hip. X-ray showed no fracture. He has been hospitalised for 3 days and given conservative treatment. Upon discharge, he was followed up and given medication and physiotherapy.
2. Ahmed was admitted to the hospital again on 24 March 2008 upon his complaint about pain. X-ray confirmed again the lack of fracture. He was discharged 3 days later. During the follow-up on 28 April 2008, the doctor recorded multiple inconsistencies not suggestive of an organic case of subjective complaint.
3. During the period between July 2008 and January 2009, Ahmed attended the hospital several times; but the doctors’ findings were unremarkable. Physical examination on 25 September 2008 revealed good range of movement of his back with no expression and indication of pain throughout the examination. Between March and October 2008, Ahmed had 52 sessions of physiotherapy; and there was report of 50% overall improvement. Between October and December 2008, Ahmed also received occupational therapy.

***Employees’ Compensation (Ordinary Assessment) Board (“MAB”)***

1. Ahmed was assessed by the MAB on 4 February 2009. Form 7 dated 18 February 2009 certified that due to his “*back and hip injuries resulting in back pain*”, Ahmed suffered 1% loss of earning capacity. Upon his objection, the assessment was reviewed leading to Form 9 dated 10 June 2009. The MAB maintained its assessment.

***Medical expert evidence***

1. On 11 June 2009, Ahmed was examined by Dr Wong Chin Hong and Dr David H F Cheng, orthopaedic experts engaged on behalf of Ahmed and MTR respectively. The doctors produced their joint expert report dated 10 August 2009.
2. To the experts, Ahmed complained about constant back pain with fluctuation. The pain increased on sitting for over 30 minutes and walking for over 15 minutes. There was also pain on lying supine on his back and he had to turn frequently in bed. He was seen changing positions for remedy. He also complained about weakness and inability to carry weight over 15 lbs. There was no neck symptom.
3. Actual examination showed that Ahmed was in good health. He walked, stood and sat normally. He could support himself on any one leg, on toes and heels. He squat and rose normally as well. At the back, there was no deformity or muscle spasm. Range of motion was good. Reflex was normal. So was muscle power and sensation. At the neck, alignment and neurology was normal. Range of motion was full. X-ray showed alignment normal; lumbar lordosis maintained; and bony injuries lacking.
4. The experts agreed that the injuries were consistent with the accident described. The diagnosis was a simple contusion of the back. The treatment given was standard, adequate and satisfactory. In view of the medical reports of the government doctors, the experts opined that there has been no complication and Ahmed’s response to the treatment was good. He has reached the state of maximum medical improvement.
5. Except for some local tenderness over the low back, there was neither significant finding not complication. The effect should be mild to moderate. Dr Cheng believed that Ahmed could resume his pre-accident job as a security guard. There would be no need to change job or any job restriction on medical ground. Likewise his social and other activities would unlikely be significantly affected. Dr Wong agreed, but added that Ahmed would need to take short breaks from time to time after prolonged walking for more than 30 minutes and repeated exertion.
6. Both experts agreed with the MAB in the assessment of Ahmed’s loss of earning capacity being 1%. Sick leave up to 1 February 2009 was considered to be reasonable.
7. Due to his persistent complaint about back pain, Ahmed underwent a MRI scan of his back in September 2009. This led to the experts’ supplemental joint report dated 8 December 2009. The MRI reportedly showed dessication of L4/5 disc with a broad base disc protrusion. The disc space was maintained. There was no posterior facet joint abnormality. Nor was bony trauma or fracture seen. The sacrum was unremarkable.
8. Dr Wong opined that Ahmed’s persistent back pain was attributable to soft tissue injuries that might not be readily detected on MRI. As there was no history of low back pain or injury, the accident was considered to be the precipitating and triggering factor to his low back pain.
9. On the contrary, Dr Cheng opined that the findings of the MRI were features of disc degeneration. There was no compression on the roots and thecal sac. The degeneration was pre-existing and not caused or related to the accident. The doctor maintained that the injury was no more than a simple soft tissue injury that should have recovered.
10. As to the sick leave, Dr Wong opined that the further sick leave until 22 May 2009 certified by the MAB was adequate. Dr Cheng however opined that Ahmed has reached maximum medical improvement by February 2009. The further sick leave since 1 February 2009 was considered to be unreasonable.

***Discussion***

1. The medical report of Tuen Mun Hospital in 22 January 2009 recorded that Ahmed could walk unaided for an hour; sit for more than an hour; and stand for 45 minutes. There was no buttock or lower back pain. He presented 40-50% overall improvement. MAB assessment was therefore made in early February 2009.
2. When Ahmed came to be examined by the experts later in June 2009, as mentioned, he seemed to suggest that he had somehow become less tolerant towards the duration of sitting and walking. Ahmed was seen always walking with the aid of an umbrella while attending this trial. He persisted in claiming that he has up to this date yet to recover; and hospital appointment for treatment and therapy was still necessary.
3. Whilst Ahmed claimed that he still felt pain and became unable to do all sorts of jobs, he revealed that he somehow sought a loading job in 2011. Whilst he claimed to have tried to find other jobs, he made no mention of such effort whatsoever until he testified. His explanation seemed to suggest that it was his then solicitors who somehow failed to mention that when drafting his statement.
4. I doubt the reliability of his evidence, if not exaggeration, in respect of his condition and disability.
5. In his submission, Mr Sakhrani pointed out that whilst medical expert may suggest possible explanation for the condition being complained of by the patient, this nevertheless has to be considered against all the objective medical findings. An overall view has to be taken. As a matter of principle, I agree. This is not a question of where the benefit of doubt lies but whether the burden of proof is discharged by evidence.
6. As a matter of fact, the possibility that Dr Wong put forward so as to link the accident with the alleged persistent pain of Ahmed, in my judgment, does not sit well with the picture presented by the objective findings recorded in the government hospital reports and those recorded by the experts during examination of Ahmed in June 2009 as mentioned above.
7. In the circumstances, to the abovementioned extent that the experts differed, I prefer Dr Cheng’s opinion.

***Pain suffering and loss of amenities (PSLA)***

1. By pleading, Ahmed claims an award for PSLA in the sum of HK$250,000. The stance of MTR is that an appropriate award should not exceed HK$80,000. Mr Sahkrani suggested HK$50,000.
2. Mr Sakhrani referred to *Tam Yuen Hoi v Chan Muk Sing & Ors*, HCPI 983/2001 (1 August 2003) as an example. There the 36-year-old carpenter fell down the stairs and was injured. Apart from tenderness over the lower back and left buttock with restricted movement of the back, there was no neurological or radiological deficit. The persistent complaint about low back pain was found to be exaggerated; and mild symptoms of a back sprain such as that should have subsided in months. There was also symptomatic pre-existing degeneration. 2% impairment of the whole person due to his back condition was attributable to the accident. The carpenter was fit to resume his pre-accident work; and the court refused to make an award for loss of earning for more than 9 months’ sick leave.
3. Each case is to be decided on its own facts. Ahmed was 45 years old at the time of the accident. He is 49 now. He came to Hong Kong in the 1970’s. He is married; and his family lives in Pakistan. There is some age difference between Ahmed and the carpenter in *Tam Yuen Hoi*. Apart from that, I see no significant feature in the present case that would have led me to conclude that this is materially more serious than the case cited by counsel.
4. Considering the evidence, I agree with Mr Sakhrani that an award of HK$50,000 under this head would be reasonable.

***Loss of earnings***

1. The pre-accident monthly earning of Ahmed was agreed at HK$7,891.38 as claimed. But MTR disputes the period of Ahmed’s incapacity to work.
2. In line with the discussion of Ahmed’s condition and the medical evidence, I accept the opinion of Dr Cheng that sick leave up to February 2009 (i.e., almost 1 year) should be reasonable for Ahmed’s recovery.
3. The loss of earnings, inclusive of MPF benefits, would have been HK$7,891.38 x 1.05 x 11.3 months = HK$93,631.20.

***Loss of earning capacity***

1. There is lack of evidential basis for finding a real handicap suffered by Ahmed in the labour market as a result of his impairment. No award would have been made under this head.

***Miscellaneous special damages***

1. The claim for medical, travelling and tonic food expenses in the respective sums of HK$14,695, HK$3,000 and HK$5,000 was not explained in Ahmed’s statement. After perusing the receipts adduced by Ahmed at the last minute, Mr Sakhrani fairly accepted that the medical expenses should be allowed in the sum of HK$13,960. It was also accepted that travelling and tonic food expenses should be allowed at HK$2,000 and HK$2,000. The total therefore is HK$17,960.

***Conclusion***

1. In summary, the award would have been as follows:

PSLA HK$ 50,000.00

Loss of earnings (inclusive of MPF) HK$ 93,631.20

Miscellaneous special damages HK$ 17,960.00

Total: HK$161,591.20

1. There would have been interest at 2% per annum on general damages from the date of writ to today and 4% per annum on special damages from the date of accident until today.
2. The award would have to be adjusted in view of contributory negligence discussed above and the employees’ compensation in the sum of HK$99,738.64 already received by Ahmed.

***ORDER***

1. Failing on liability, the claim is dismissed. Following this event, I make a nisi order that Ahmed shall pay MTR’s costs of this action, including any costs reserved. Costs shall be taxed, if not agreed. For clarity, I certify the engagement of counsel. In the absence of application in 14 days to vary, the nisi costs order shall become absolute.

# (Simon Leung)

# District Judge

The plaintiff, in person, present

Mr Ashok SAKHRANI instructed by Messrs Deacons for the defendant