DCPI000329/2002

DCPI 329/2002

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 329 OF 2002

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| BETWEEN |  |  |
|  | HAU KIT HO | Plaintiff |
|  |  |  |
|  | AND |  |
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|  | STARWAY INTERNATIONAL DEVELOPMENT LIMITED trading as TAO HEUNG SUPER 88 | Defendant |

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Coram: His Honour Judge L. Chan in Court

Dates of hearing: 18 to 19 September 2003

Date of Judgment: 22 September 2003

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JUDGMENT

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The plaintiff and her husband had the habit of having a swim at the beach in the morning and then enjoy their morning tea in a restaurant. She did so on 1st September, 2001. On this day, they brought along their eldest daughter for the tea. The daughter was mildly mentally retarded. The venue for the tea this time was the defendant's restaurant which was at less than a 10 min. walk from the plaintiff's home in Tseung Kwan O. When the plaintiff went to the defendant's female toilet after the tea, she had a fall and suffered a fracture to her left ankle. She was taken by an ambulance to the Tseung Kwan O Hospital where she had an operation to fix the fracture and was hospitalized for 9 days.

# Issues

1. She sued the defendant for damages for breach of the common duty of care stipulated in the Occupier's Liability Ordinance, Cap. 314 or for negligence or both. The particulars of negligence as pleaded were: causing or permitting the toilet floor to become or remain wet and slippery state; failing to place any or any adequate warning sign in the wet and slippery areas of the toilet; failing to warn the plaintiff that the floor was slippery and dangerous.

2. On quantum, she asked for damages for PSLA and damages under section 20C(4) of the Law Amendment and Reform (Consolidation) Ordinance, Cap. 23 for the loss of her ability to render gratuitous services to her husband and a daughter who was residing with her and her husband. She also asked for some special damages occasioned by the incident.

3. The defendant denies breach of the common duty of care or negligence. Alternatively, the defendant says that the plaintiff was guilty contributory negligence.

4. On quantum, the plaintiff argued for PSLA at HK$250,000 whilst the defendant at the trial was only prepared to agree that this item should be somewhere between HK$150,000 and HK$200,000. For damages under section 2C(4) of LARCO, the defendant simply denied that such item was payable in this case. Alternatively, the defendant said that there had to be evidence of payment to others for provision of replacement service before the court would award such damages. There were also arguments on some relatively minor items of special damages like medicine, traveling and tonic food. I will deal with these matters below.

# Liability

# The plaintiff

5. The plaintiff adopted her witness statement as part of her evidence in chief and gave supplemented oral evidence. She said that she was born on 24th April, 1947 and is now 56 years old. On 1st September, 2001 after having finished the tea, she and her daughter went to the toilet. When inside the toilet, she saw a female amah there who was not doing anything. There were 6 cubicles with 5 cubicles in a row on the right hand side of the toilet and the 6th one at the side of the 5th cubicle at the end. On the left hand side were a number of washing basins.

6. When inside the toilet, the plaintiff guided her daughter to the 5th cubicle at the end of the toilet. She went inside this cubicle to make sure that it was clean and safe. She then came out and let her daughter in. She then closed the door of this cubicle and went into the neighbouring 4th cubicle. She found that there was no toilet roll inside the 4th cubicle. She then came out and asked the amah for some toilet roll. When she first came out of the cubicle, she was looking at the face of the amah and she asked for toilet roll. She then stepped forward to the amah for 2 to 3 steps and lowered her eyesight and she saw that the amah was cleaning the floor with a mop and a bucket of water before her. She immediately said "Oh you are cleaning the floor. It's slippery!" But before she was able to finish what she said, she fell on the ground. She wanted to hold on to the amah but could not do so.

7. When she was on the floor, she could fell with her hand that the floor was wet. The place where she was sitting was also wet. Her pair of leather slippers as well as the part of her trousers covering her buttocks were made wet. The amah then came over to help her up, but her pain was so serious that she could not get up. She was still on the floor when her daughter came out of the 5th cubicle and the daughter then went for help form her husband. The amah also sent out for help. When they were seeking help elsewhere, the plaintiff noticed that the floor outside the cubicles was wet and slippery.

8. After 5 minutes, a female manager or captain came in to help. She was followed by a male staff. They helped the plaintiff stand up and move to another room for a rest. After staying in the other room for 15 to 20 min. and seeing that the plaintiff still could not walk, they suggested that an ambulance be called to send her to the A & E Dept. of the Tseung Kwan O Hospital. Before the arrival of the ambulance, she was escorted back to the toilet because she had not performed the function in the last visit. She then saw that there was a foldable yellow warning sign saying in "Caution Wet Floor" in Chinese and English. However, she insisted that there was no such sign when she went in for the first time together with her daughter. She believed that the sign was placed in the toilet after the accident. She was then sent to the Tseung Kwan O Hospital by the ambulance.

9. She said in cross-examination that she had been to the toilet in question in her visits to this restaurant prior to the accident. The lighting therein was a bit inadequate. She had at times noticed the notice fixed on the wall saying "Caution Wet Floor" in Chinese but sometimes not. She knew that the toilet was slippery and would take extra care.

10. She maintained that when she walked out of the 4th cubicle, she was looking at a higher level and thus did not notice that the amah was cleaning the floor. However, while she was talking to the amah and taking those 2 to 3 steps, she lowered her eyesight and saw that the amah was cleaning the floor with the mop and bucket of water. She fell before she had uttered her exclamation that the floor was slippery. The amah had cleaned about half of the toilet when she fell.

11. Her attention was then drawn to paragraphs 5 and 6 of her witness statement which read:

"5. After I had entered into my cubicle and before closing the door, I found that there was no supply of toilet paper. I therefore got out of my cubicle and tried to get some toilet paper from the Amah whom I noticed was standing in the lavatory. So I turned around and walked out of my cubicle and I saw the Amah standing in front of the washing basins. At that time, the Amah was holding a mop and was sweeping the floor. I recall that the Amah was around 50 years old, with short and thin figure. I forgot what she was dressing at that time.

6. At the time when I walked out from my cubicle, the distance between the Amah and me was around 2-3 feet. While I was walking towards the Amah for 2-3 paces, I said to the Amah, "There is no toilet paper. You are sweeping the floor. Oh, the floor is slippery ..." I remember that before finishing this dialogue, I slipped and fell onto the floor (the Accident). I felt a serious pain and I could not get up by myself." (emphasis supplied)

She however maintained what she said in court was correct and that she did not see that the amah was cleaning the floor when she first step out of the 4th cubicle. She further said that the error in her English statement was owing to misunderstanding of the interpretation as she knew very little English.

# The defendant

12. The defendant called Mr. Lam Kam Leung, one of its then managers. Mr. Lam also adopted his witness statement as his evidence in chief. He had been working in the defendant restaurant since its opening on 28th June, 2001 and was one of its four managers. He aid that there was an amah responsible for cleaning the female toilet in question. She would clean up every part of the toilet 3 times a day at 9:00 a.m., 3:00 p.m. and 5:30 p.m. Once every few days, she would take away the covers of the drains and clean up the whole floor as well as the drains. The amah was supervised by four female officers who would fill in a supervision form detailing the aspects of work of the amah that had been inspected by the officers. The form was clipped on a writing board hung in the toilet. He also said that there was sufficient lighting in the toilet and the floor tile was in blue colour. Between the washing basins on the one side and the cubicles on the other, there was a drain hole. There was also a drain under the washing basins. There were a warning of "Caution Wet Floor" in Chinese and English affixed on the wall at the entrance of this toilet and two foldable stands bearing the words "Caution Wet Floor" in Chinese and English placed at the entrance of the toilet and somewhere off the washing basins.

13. In cross-examination, he admitted that the supervision on the amah was done only through the female officers and he did not give any instruction directly to the amah. He further admitted that he would only go into the female toilet if there was something that needed repair and he would not go in if it was avoidable. He also admitted that he was not aware that there was a second warning of "Caution Wet Floor" affixed on the wall next to the hand drying papers.

14. Mr. Lam's evidence was only on the general management of the toilet. He gave no evidence on the cleaning by the amah in that particular morning. He did not seem to have been involved in the handling of the accident. Indeed, he did not seem to have appeared at the scene at the time or taken part in arranging for the plaintiff to be sent to the hospital.

15. The defendant did not dispute that at the time of the accident, the amah was cleaning the toilet with water and a mop. It also has not called the amah to give evidence on exactly how the accident happened.

# Findings of Fact

16. The defendant asked me to hold that the when the plaintiff turned around, she should have been aware that the amah was cleaning the floor. She should have then stopped walking forward and instead should have asked the amah to hand her the toilet roll. It was therefore negligent for her to have stepped forward.

17. I however accept the plaintiff's evidence as to how the accident happened. She was forthright and direct in answering questions. She was severely cross-examined but remained unshaken. When she first entered the toilet, the amah was not doing any cleaning or anything. She did not just let her daughter go into the 5th cubicle. She went in to check if that was clean and safe first before letting her in. It was only when she was satisfied with the conditions in the cubicle that she let her daughter entered. She was obviously concerned and about the conditions of the toilet and its floor and she was taking care to make sure that it was safe for the use by her daughter as well as by herself. She did not just walk into the toilet as if she was walking on carpet. She went in with a cautious mind. She also said in cross-examination that she knew the floor was a bit slippery and would take some caution. But everything appeared to be satisfactory up to the moment when she was realized that the amah was cleaning the floor. That was why she made the exclamation which she could not even finish before her slip. Her exclamation showed that she was concerned about a wet floor. However, she only realized the danger almost at the moment of her slip.

18. She fell not because of the general conditions of the toilet, but because of the sudden cleaning of which she was not warned beforehand and which dawned on her too late. I accept her explanation as to the error in paragraph 5 of her witness statement referred to above as that was a very minor error that could have been made easily in the drafting process. The difference between the version in the statement and her oral evidence was small. When she turned around to walk out of the 4th cubicle, she intended to ask the maid for a toilet roll. It was not unreasonable or impossible if she did not notice that the amah was cleaning the floor when she first looked at her as she was only minded to ask her for a toilet roll and was thus looking at her face.

19. Regarding the two small warning signs of "Caution Wet Floor" affixed on the wall, they have become part of the fixture of the toilet. They were there not to warn the customers of any particular risks but of the usual risks in a typical toilet floor as caused by a degree of wetness that one may commonly come across. They cannot cover the special situation of cleaning with water where the floor would be unusually wet and slippery and the risks of fall much greater. In this connection, I refer to section 3(4) of the Occupiers Liability Ordinance which provides:

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

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

In such event, special warning is necessary or that the toilet should be cordoned off until the cleaning is finished and the floor has become dry. These two small warning signs were insufficient to warn the plaintiff of the slippery floor caused by the cleaning it with water.

20. I also accept the plaintiff's evidence that the foldable stands bearing the words "Caution Wet Floor" were no where in sight when she first entered the toilet and was only placed in a conspicuous place when she was brought back to the toilet for the second time. If these foldable signs or sign was placed in a conspicuous place before she fell, she would have taken more precaution as she was with her mildly mentally retarded daughter and was very prudent about her well-being. But in any case, she slipped because of the sudden event of cleaning with water of which she was not apprised. Even if the foldable signs were there, the situation would not have been different as she did not expect that the amah would suddenly clean the floor with water when the amah was not doing anything when she first entered the toilet.

# The Law

21. Mr. Wong for the defendant has drawn my attention to the cases of **Cheung Wai Mei v. The Excelsior Hotel (Hong Kong) Ltd.** trading as The Excelsior CACV No. 38 of 2000; **Laverton v. Kiapasha** (t/a Takeaway Supreme [2002] EWCA Civ. 1656, 19.11.2002 and **Lau Shui Chun v. Leung Tung Ping Metal Factory Ltd.** unrep. HCPI 75 of 1997. In **Cheung Wai Mei**, the plaintiff alleged that she had suffered outside the side entrance of the hotel. The majority of the Court of Appeal did not accept her version of events and found that the defendant's system to clean up spillages caused by customers was sufficient. The appeal was thus allowed. In the present case, the accident was not caused by the inadequacy of the system of cleaning, but by the event of cleaning itself for which the plaintiff was not warned and had no notice.

22. In **Laverton v. Kiapasha**, the claimant had a night out on 23rd Saturday, 1999 visiting different drinking establishments. Finally, she went to the defendant's take-away-shop. It had been training all night. It was a busy night and customers had walked wet and dirt into the shop. There were 20-30 customers in the shop at the material time and it was a smallish shop. The claimant joined a queue. She was wearing ankle boots with cowboy style heels about one and half inches high. She saw someone ahead of her in the queue and stepped forward to speak to him. She slipped on her right foot and fell to the floor injuring her left ankle. She went home in a taxi and found that she had to go to a hospital. At hospital, it was found that her ankle had been broken and badly displaced. She had had a lot to drink that night and on examination in the hospital was smelt of alcohol.

23. The defendant had not noticed the accident but had taken three precautions. First, in 1966 the floor of the shop had been re-laid with slip resistant tiles from a reputable manufacturer. But the defendant himself appeared to have conceded that the floor was still slippery when wet. He took precautions for removing spillages and excessive moisture in rainy days. Secondly, he had a doormat of convention coconut matting type but not fixed in place. The trial judge found that it had become displaced at the time of the accident and was not fulfilling its function. Thirdly, the defendant had a system of mopping up. He kept 2 mops and a bucket at the back of the shop to deal with spillages and water brought in by customers. He said that on busy nights they mopped up six to seven times. But they could not do so when there were 20-30 customers which made the shop full. The majority of the English Court of Appeal allowed the defendant's appeal. Hale, L.J., with whom Peter Gibson, L.J. agreed, said in the following paragraphs of the judgment:

"16. The occupier's duty of care is the same in all cases but its application depends, and depends crucially, upon "all the circumstances" of the particular case before the court. He has to take 'reasonable' care to see that his visitors are 'reasonably safe'. He does not guarantee their safety. The shop-keeper's duty was put this way by Lord Goddard CJ, in **Turner v. Arding & Hobbs Ltd.** [1949] 2 All ER. 911 at 912:

"The duty of a shopkeeper in this class of case is well-established. It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an unusual danger is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof is on the defendants to explain how it was that the accident happened."

20. The question is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference.

22. The reality is that at such times the customers can be reasonably safe if they take reasonable care for their own safety. The unchallenged evidence of the claimant's two female companions was that it was obvious that the floor was wet. ...... The more obvious such water is, the greater the need for the customer to take care. But all floors are to some extent slippery when wet. In my view, in that particular shop, at that particular time, it was not reasonable to expect the shopkeeper to ensure that the mat was in place and mop the floor often enough and efficiently enough to prevent its being wet, even significantly or considerably so. To suggest otherwise is a counsel of perfection imposing a near strict liability which the law does not at present do. I would thereof allows the appal and dismiss the claim in its entirety."

24. In the present case, the toilet floor was not in its usual conditions at the accident. Its usual conditions did not produce any problem for the plaintiff as she had gone in and arranged her daughter to be in the 5th cubicle to her satisfaction. She suffered the accident because of the risks produced by the cleaning of the floor with water and the floor then had more water and was more slippery than usual. The reasoning in **Laverton v. Kiapasha** therefore does not apply here.

25. The defendant referred me to **Lam Shui Chun** for the purpose of contributory negligence. In that case, the plaintiff had been using the same toilet for 10 years or so. The floor was of concrete steel floated flooring and was slippery when wet. The plaintiff was fully aware of such condition. It was possible that the long exposure to the wet and slippery surface had somewhat blunted the plaintiff's awareness. He wore hard rubber shoes which, according to expert evidence, were more slippery than soft rubber shoes on that surface. Suffiad, J. found that the plaintiff should have taken better care of himself and held that he was 40% to blame for his fall.

# Conclusion on Liability

26. In this case, the plaintiff had been to this toilet a few times before and knew that it was a bit wet and would be careful. But she did not fall when the toilet was in its usual conditions of which she was aware. She fell because of the unusual wetness caused by the water used in the cleaning of which the defendant had not warned her about and she was not aware. There is no evidence to suggest that her footwear was unsuitable for the usual conditions of this toilet. I stressed that she had gone into it and inspected the 5th cubicle before allowing her daughter to use it. She was thus paying attention to the conditions of the toilet. In the circumstances, I find that the defendant is liable to the plaintiff for breach of the common duty of care as well as for negligence. I also find that the plaintiff is not guilty of contributory negligence.

# Quantum

# PSLA

27. There are 4 medical reports. The first one was by Dr. Chan Pui-kwan of the Tseung Kwan O Hospital dated 7th Dec., 2001. The 2nd report was a joint medical report prepared by Dr. Arthur Chiang prepared for both parties and dated 13th April, 2003. The 3rd report was by Dr. Samson Chan Chi-fai of Tseung Kwan O Hospital dated 29th April, 2003. This report was probably to answer a query raised in Dr. Chiang's report. The 4th report was also by Dr. Chiang dated 12th June, 2003.

28. Dr. Chan Pui-kwan's report recorded that the plaintiff was admitted into the Tseung Kwan O Hospital on 1st Sep., 2001 after the accident. X-ray on admission showed a fracture over the left lateral malleolus. {Physical examination revealed that the left ankle was grossly swollen with a tender spot over lateral malleolus. Range of movement decreased because of pain. There was no sign of nerves or vessels injury. Operation was done on 6th Sep., 2001 for open reduction and screw fixation of the fracture. Post-operatively, the wound healing was satisfactory. The plaintiff had followed treatment in the outpatient clinic and was last seen on 22nd November, 2001. The x-ray showed good alignment and she could walk unaided. I should point out that the plaintiff in her evidence said that she could only walk a few steps unaided when she did so before Dr. Chan.

29. Dr. Chiang interviewed the plaintiff on 12th March, 2003. The report contained the matters in Dr. Chan's report and also recorded that the plaintiff was discharged from hospital with a wheelchair for her to move about. She was referred for follow up treatment in the fracture clinic of the Hospital. She then attended 5 sessions of acupuncture from 20th Sep., 01 to 10th Oct., 01. The leg splint fixed in the operation was removed in about 4 weeks. She then used a frame for support in walking for 2 to 3 months. According to Dr. Chan, the healed satisfactorily. The plaintiff also added in her evidence that by the end of 2001 or early 2002, she was trying to walk with a walking stick.

30. Dr. Chiang also noted that in late February to early March, 2002, she travelled to Guangzhou of the Mainland and received 15 intramuscularly injections to relieve her knee pains. She was also given herbal medicine for the same purpose. She had 10 consultations with the clinic operated by the Federation of Trade Unions which also prescribed herbal medicine for her. In Dec., 2002, she resorted to bonesetter treatment at the Kwong Wah Hospital to her ankle but did not notice much improvement. In Feb., 2003, she had received an injection to her left ankle from the orthopaedic specialist clinic which produced noted improvement in her ankle pain.

31. She said that since the injury, her husband had taken over all the household chores which used to be discharged solely by her. She also could not resume her habits of morning swimming or hiking.

32. Dr. Chiang commented that x-ray showed that the fracture of the distal tibula had well united and there was no post-traumatic arthritic change. The range of motion of the left ankle was satisfactorily preserved. There was no obvious sign of fracture complication. Of the 3 screws used for fixing the lateral fibular fracture, the head of the middle screw was palpable under the skin and the other 2 screws mildly protruded t he screw ends. These screws could be removed in about a year after the consolidation of the fracture and could have been removed at the time of the interview. The residual complaints of pain after prolonged walking, mild pain in left heel when she started walking, some blocking feeling in her left ankle when she moved her ankle in certain angle and discomfort in the malleolar region of the left lateral ankle when she lowered her body to sit down could be would have a good chance of improvement with physiotherapy treatment. Dr. Chiang recommended 30 sessions of physiotherapy.

33. Dr. Chiang opined that the permanent impairment of the whole person after the removal of the screws and the suggested course of physiotherapy was at 3% by reference to the Guide to the Evaluation of Permanent Impairment of the American Medical Association. He was of the further view that after the removal of the screws and the physiotherapy, there is a reasonable chance for the plaintiff to perform the daily activities.

34. The plaintiff also complained of knee pain since about 3 months from the injury and Dr. Chiang said that one of the possibilities was that there were mild pre-existing knee pain which was aggravated by the increase in right-sided weight bearing during the period of the left sided protected weight bearing with walking aids. He asked for an updated medical report from the Tseung Kwan O Hospital.

35. Dr. Samson Chan of the Tseung Kwan O Hospital furnished a medical report dated 29th April, 2003 in response to the request by Dr. Chiang. The report stated that there were pre-existing knee complaints present for a few months before the accident. Dr. Chan accepted that there was a possibility that the knee pains could have been aggravated by the left ankle injury as the plaintiff had to walk with non-weight bearing for a while because of the degenerative condition of her knees, but the ankle injury had recovered and the knee pains should have nothing to do with that.

36. Dr. Chiang in his supplemental report dated 12th June, 2003 said that he agreed with Dr. Samson Chan that the knee symptoms were temporarily aggravated in the rehabilitation stage of the ankle and the knee symptoms might not be considered a permanent impairment. In fact, Dr. Chan was referring to a possibility, but Dr. Chiang elevated to a definite event. Having considered the view of Dr. Chiang carefully and the report of Dr. Samson Chan, I agree that it was Dr. Chiang's confirmed view that there was the aggravation by the injury to the ankle.

37. Both sides have referred me to **Chan Ming v. Wayfine Investment Ltd.** (trading as Wayfair Warehousing Co.) unrep. HCIP 148 of 1997 and **Cheung Hei Kwong v. Kwong Key Construction and Engineering Ltd.** HCIP No. 1260 of 1999. In **Chan Ming**, the plaintiff was a delivery worker. In the course of delivering some heavy computer equipment on 2nd April, 1994, his left foot was hit by a quantity of goods that fell off a trolley and was trapped at the ankle and suffered significant injuries. Medical reports showed that he had suffered a fracture of the left lateral malleolus. Open reduction, internal fixation and bone grafting were done on 30th April, 1994. He was discharged from hospital on 7th May, 1994 and remained on sick leave till 10th March, 1995. He was also examined by Dr. Chiang who revealed that the plaintiff's leg had been fixed with plaster for 4 weeks. Her had to use clutches and attend follow up treatment and physiotherapy. He could walk unaided by October, 1994. For a considerable period after the accident, he experienced stiffness, pain after prolonged periods of walking and standing. The fracture healed with good alignment and no post-traumatic degenerative change. Dr. Chiang also opined a 3% impairment of the whole person. Master De Souza awarded him HK$200,000.00 for PSLA on 2nd April, 2001.

38. In **Cheung Hei Kwong**, the plaintiff was engaged in carrying bags of plaster at 50 kg. Each. On 25th Nov., 1996, he tripped over a piece of loose jute rope on the ground and lost balance sustaining fracture of the left ankle and abrasions over abdomen and chest wall. He suffered an inversion injury to his left ankle which was grossly swollen. X-ray showed a fracture of distal fibula. In a report of 22nd June, 1998, Dr. Samson Chan wrote reported that the plaintiff still had significant pain in his left ankle one and half years after the injury. X-ray showed that the fracture had healed. An MRI of his ankle and foot did not confirm any significant soft tissue injury. As at the date of the report, the plaintiff was unable to perform his construction site work. On 12th June, 2000, he was examined also by Dr. Chiang who found, inter alia, that he had to wear ankle support after playing sports to reduce the ankle swelling, the left ankle would feel tire after walking for about 10 minutes, there was stiffness and weakness on squatting, the left ankle feels symptomatic after walking 2 flights of stairs and mild pain in his back and lower limp. The Court however accepted the opinion of the defendant's expert Dr. Danny Tsoi and found that the constant pain in the plaintiff's left foot was because of sciatic nerve pain from the compression of L5 of the spine which had nothing to do with the accident. After reviewing the case of **Chan Ming**, **To** **Ying Wa v. Cargo-land (Warehouse) Development Ltd.** [2001] HKWC 127, **Yeung Sze v. Win Art Design and Decoration Co. Ltd. and Chan Wai Leung v. Mo Sheung Wah** [2001] HKEC 1311, Nguyen, J. awarded HK$200,000 for PSLA.

39. The plaintiff also referred me to the cases of **Lau Kin Wai v. Chan Wai Sang** BCPI 1007 of 2000, **Sui Wai Man v. Lee Chi Chong** PI No. 174 of 1994 and **Lam Kwai Yip v. Yuen Yun Kui** NO. A12617 of 1994. These cases together with **Wong Ka Pang v. Wong Chun Wang** HCPI 644 of 1998 which was cited to me by the defendant were not as analogous as **Chan Ming** and **Cheung Hei Kwong** and I would follow these two cases and award HK$200,000.00 for PSLA.

# Loss of Services under Section 20C(4) of LAR(C)O

40. Mr. Yip submitted that because of the injury, the plaintiff had been incapacitated from performing the household chores which were all done by her prior to the accident. After the accident, all such work was done by her husband and that lasted for some 19 months. The defendant challenges that the period of incapacity was not that long. The evidence is not clear on the duration of the incapacity. Apparently, when the plaintiff was interviewed by Dr. Chiang on 12th March, 2003, she told Dr. Chiang that she was still unable to perform those duties and her husband was still performing them.

41. I accept that before the accident, the plaintiff did all the household chores and when the plaintiff was wheelchair-bound for the 3 to 4 months after the accident, she was totally incapacitated from performing those chores. I also find that since early 2002, she was already trying to walk with a walking stick and gradually reducing her reliance on it. I further find that since the time when she did not require the use of the wheelchair, she was able to gradually assume some of the household chores as she was physically in a position to do so. There are household chores that can be discharged without a lot of physical effort. But I also find that at least by 12th March, 2003, she had not assume all the chores that she had done previously and her husband still had to assume some of them. The plaintiff claims for an award under section 20C(4) of LAR(C)O which states:

"(4) Where injury is caused to any person by any wrongful act, neglect or default which entitles him to maintain an action and recover damages in respect thereof and which causes any dependant of the injured person to be deprived of his gratuitous services, the action may include a claim for damages by the injured person for impairment of his ability to render such services."  
(emphasis supplied)

42. Mr. Yip for the plaintiff referred me to **Fung Kwok Ki v. Wing Sang Construction Co. Ltd. and Others** HCPI 757 of 2002, a decision of Suffiad, J., for an award under section 20C(4) of LAR(C)O. In that case, the plaintiff was injured by a box of falling tiles when he was delivering metal cable trunkings to a construction site. He was paraplegic and dysphasic for the 3 years up to the trial. His wife looked after him for the full 3 years and he claimed an award to represent the value of her services. It was allowed. I note that the present claim by the plaintiff is not for services rendered to take care of her but for "impairment of her ability to render such services". **Fung Kwok Ki** is therefore inapplicable.

43. The plaintiff further referred to **Lily Tse Lai Yin v. The Incorporated Owners of Albert House** HCPI 828 of 1997 and **Wong Sau Kam and Yeung Kong v. Shum Yuk Fong** HCPI 798 of 1998, also decisions by Suffiad, J. **Lily Tse** was a case of the mother doing all the household work and the preparing and cooking of breakfast for her daughter. As a result of the accident, she could not carry out these functions anymore. The plaintiff there claimed and obtained an unchallenged award at HK$50,000.

44. In **Wong Sau Kam**, the deceased before the accident used to perform functions of a handyman around the house and in helping generally with the children and with work about the house. The plaintiff claimed HK$500.00 per month. The defendant, whilst not disputing the claim, submitted that it was general damages and should be awarded in a lump sum rather than on the multiplier and multiplicand approach. The learned Judge accepted the defendant's contention and awarded a lump sum of HK$60,000.00 as offered by the defendant.

45. The defendant also opposes to such a claim calculated on the basis of multiplier and multiplicand approach. I was also referred to **Daly v. General Steam Navigation Co. Ltd.** [1980] 3 All ER 696 where the English Court of Appeal took the view that such damages for the pre-trial period should form part of the general damages for PSLA. Doing the best I can, I would award an extra sum of HK$30,000.00 by way of general damages for the plaintiff to reflect the impairment of her ability to deal with the household chores.

46. The plaintiff has been a housewife for about 10 years before the accident. There was thus no claim for loss of earnings. The remaining items are for special damages as follows:

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| --- | --- |
| (i) hospital ward fee at HK$612.00 | (agreed); |
| (ii) hospital out-patient fee at HK$500.00 | (agreed); |
| (iii) knee wrap costs at HK$132.00 | (agreed); |
| (iv) future medical expenses at HK$20,500.00 | (agreed); |
| (v) medicine at HK$900.00 | (disputed); |
| (vi) Chinese herbalist fees at HK$1,342.20 | (disputed); |
| (vii) travelling expenses at HK$1,000.00 | (disputed); |
| (viii) tonic food at HK$5,000.00 | (disputed); and |
| (ix) injections in Guangzhou at HK$2,000.00 | (disputed). |

47. Regarding medicine expenses, the plaintiff produced receipts to prove payments at HK$900.00, the plaintiff produced receipts to prove HK$546.90. Of those receipts, there was one for the purchase of pain killing pills at HK$140.00 made on the recommendation of and by a neighbour for the plaintiff and the plaintiff did not find those pills useful. I therefore deduct HK$140.00 from the claim reducing it to HK$406.90 as proved by receipts. For the purchases not proved with receipts, I decline to allow them as I cannot tell with confidence what were the medicine purchased and whether they were useful or not. I therefore allow HK$406.90 for medicine purchased.

48. For the Chinese herbal medicine including 5 sessions of acupuncture at the total costs of HK$1,342.20, they were all supported by receipts. But of this sum, the plaintiff admitted that HK$30,000.00 were spent on a bonesetter in Kwun Tong recommended by a neighbour and that treatment did not prove to be useful. I therefore deduct HK$300.00 and allow the rest at HK$1,042.20.

49. The next item is for travelling expenses at HK$1,000.00. The plaintiff was wheelchair-bound for 3 to 4 months. She took many journeys by taxi to the Tseung Kwan O Hospital for follow up treatment. She was living in Tseung Kwan O and each round trip cost her HK$30.00. For her journeys by taxi to the clinic of the Federation of Trade Unions, they were a lot more costly as the clinic was in Kwun Tong. There was also the costs for her trip to Guangzhou in late February to early March, 2002. All in all, I find the total sum of HK$1,000.00 reasonable and I allow the same in full.

50. For tonic food, the plaintiff gave evidence that she took some very expensive Chinese tonic food. There is no expert evidence on the need for such food. Following **Yu Ki v. Chan Kit-lam** HCA HKLR 419 and judging from the severity of the injury, I would allow HK$2,500.00 under this head.

51. Regarding the claim for HK$2,000.00 for 15 injections in Guangzhou, the plaintiff has not been able to produce any receipt as they had been damaged and lost. Judging from the fact that the plaintiff had to stay in a hotel for 3 days for the purpose of the injection and the injection was useful, I would allow this sum in full.

# Total Award

52. The total sum I award the plaintiff in this action is as follows:

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| --- | --- | --- | --- |
| (i) | PSLA | HK$200,000.00 | ; |
| (ii) | Section 20C(4) of LAR(C)O | HK$30,000.00 | ; |
| (iii) | hospital ward fee | HK$612.00 | ; |
| (iv) | hospital out-patient fee | HK$500.00 | ; |
| (v) | knee wrap costs | HK$132.00 | ; |
| (vi) | future medical expenses | HK$20,500.00 | ; |
| (vii) | medicine | HK$406.90 | ; |
| (viii) | Chinese herbalist fees | HK$1,042.20 | ; |
| (ix) | travelling expenses | HK$1,000.00 | ; |
| (x) | tonic food | HK$2,500.00 | ; |
| (xi) | injections in Guangzhou | HK$2,000.00 | . |
| Total: |  | HK$258,693.10 | . |

53. I therefore make an award at HK$258,693.10. I further award interest on general damages at 2% per annum from the date of writ to date of judgment and interest on special damages at half of the judgment rate from the date of accident to the date of judgment. Since this case is not an easy one and has been fought on almost fronts with concessions only for those that are indisputable, I also order that the defendant do pay the plaintiff costs of this action with certificate for counsel.

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|  | Louis K. Y. Chan |
|  | District Judge |