DCPI No. 333/2010

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 333 OF 2010

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BETWEEN

SO YEE LING Plaintiff

and

MTR CORPORATION LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_

Coram: HH Judge Lok in Court

Dates of trial: 15 & 16 March 2011

Date of handing down of Judgment: 29 April 2011

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JUDGMENT

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1. This case arises out of an alleged “slip-and-fall” accident in the passenger concourse of the Kowloon Tong Mass Transit Railway Station (“the Station”).

*Background*

1. On 26 October 2009 at about 9:10 am, the Plaintiff walked through the South Passenger Concourse of the Station near Exit D when she fell on the ground. The Plaintiff claims that there was water on the ground at the site in issue which caused her to slip and fall. After the fall, a report was made to the staff of the Station and the Plaintiff was sent by ambulance to Queen Elizabeth Hospital for treatment.
2. As a result of the alleged accident, the Plaintiff claims that she had suffered serious injuries to her lower back and right knee. It is also the Plaintiff’s case that the alleged accident was caused by the negligence and the breach of the common duty of care on the part of the Defendant.
3. The Defendant disputes that the ground was wet or slippery at the time of the alleged accident. Alternatively, if there was water on the ground at the material time, the Defendant claims that the it had discharged the common duty of care by having reasonably entrusted the cleaning work of the Station to an independent cleaning contractor and that the Defendant had taken reasonable steps to ensure that the cleaning work undertaken by the contractor had been properly done. In other words, the Defendant is relying on the statutory defence as provided for in s. 3(4)(b) of the Occupiers Liability Ordinance, Cap. 314 (“the Ordinance”). In the pleading, the Defendant is also relying on the defence of contributory negligence, but Mr. Sakhrani, counsel for the Defendant, is not actively pursuing such defence at the trial.
4. The parties are able to agree on the quantum of the Plaintiff’s claim in the sum of $230,000. Hence, the remaining issues of the case are as follows:
5. whether the ground was wet or slippery when the Plaintiff fell on the ground in the South Passenger Concourse of the Station on the day of the accident;
6. assuming that the answer to the last question is affirmative, whether the Defendant can rely on the statutory defence as provided for in s. 3(4)(b) of the Ordinance.

I will deal with these issues in turn.

*The condition of the ground at the material time*

*(i) Witnesses in support of the Plaintiff’s case*

1. It is common ground that the alleged accident occurred on the public holiday of the Chung Yeung Festival, and the weather was dry on that particular day.
2. The Plaintiff’s first witness is Mr. Lau For Ki (“Mr. Lau’) who was a passer-by on the day of the accident, and he works as an electrical worker in construction sites. Although Mr. Lau did not actually witness how the Plaintiff fell, he confirms that there was a patch of water on the ground at the material time. He took some photographs of the patch of water with his mobile phone.
3. After the Plaintiff had fallen on the ground, some passers-by made a report to the staff working at the Station. When a male and a female staff arrived at the scene with the wheelchair, a passer-by asked the staff to remove the patch of water on the ground. However, the male staff told that passer-by that the matter had nothing to do with him and just asked him to leave.
4. As the patch of water cannot be seen on the photographs taken by Mr. Lau, he is asked to draw the patch of water on the photographs. According to his drawing, the patch of water was rather large in size covering the area of a few floor tiles, and this is also his evidence at the trial.
5. Prior to the accident, Mr. Lau did not know the Plaintiff. However, by agreeing to come to court to testify, he received a sum of $3,000 from the Plaintiff as some kind of compensation for his loss of income for 2 days.
6. The Plaintiff herself also testifies at the trial. She is now aged 56 and she works as an editor for a church organisation. On the day of the accident, she was planning to meet her friends in Exit E of the Station for the purpose of attending a retreat for the members of her church. Just when she was walking at a normal pace in the Passenger Concourse near Exit E, she fell on the ground.
7. After she fell down, she looked around and saw that there were some water droplets on the floor. There was also a streak mark on the ground caused by the contact with the rubber sole of her shoes. At the scene, the Plaintiff is not sure whether any passers-by had mentioned about the patch of water to the staff of the Station, but she is certain that such matter was raised when she was in the rest room of the Station.

*(ii) Witnesses in support of the Defendant’s case*

1. The Defendant’s first witness is Mr. Lam Mou Sang (“Mr. Lam”) who was a Station Officer of the Defendant and was on duty in the South Concourse of the Station on the day of the accident.
2. At approximately 9:10 am on 26 October 2009, a passenger came to Mr. Lam and told him that a lady was injured after a fall near the South Concourse. Mr. Lam attended the scene immediately and saw the Plaintiff sitting on the ground. By that time, the Plaintiff told him that she slipped on the ground because it was slippery. Mr. Lam immediately inspected the floor in the surroundings, but he found that the floor was dry at that time. Had there been water on the floor, he would have summoned the cleaning workers to clean the floor immediately. With the use of a wheelchair, Mr. Lam took the Plaintiff to the rest room of the Station, and the Plaintiff was later taken to hospital for treatment.
3. The Defendant’s second witness is Mr. Tang Kim Yu (“Mr. Tang”) who was the Station Controller of the Station on duty on the day of the alleged accident. He was the staff of the highest rank in the Station responsible for its daily operation. At around 9:10 am, Mr. Tang learnt about the accident involving the Plaintiff. After the Plaintiff was taken to hospital, Mr. Tang also inspected the location of the alleged accident and found that the ground was dry.
4. After the accident, Mr. Tang made a report of the incident in an “UE Report”. According to such report, the floor of the South Concourse was dry and clean at the relevant time. He prepared the report based on the information provided by Mr. Lam.

*(iii) Assessment of the evidence*

1. After listening to the Plaintiff’s witnesses, I am very reluctant to find that they are not telling the truth, in particular Mr. Lau can be considered as an independent witness. Despite such observation, I do have some difficulty with the evidence of the Plaintiff and Mr. Lau. Firstly, their descriptions of the size of the patch of water on the ground are vastly different. Whilst the Plaintiff describes that there were only small water droplets with the size of a moon-cake on the floor at the material time, Mr. Lau testifies that the patch of water was rather large in size covering the area of a few floor tiles. I have reminded myself that witnesses might make mistakes about such kind of descriptions, yet it is still not easy to explain why there is such a great difference in their evidence. Secondly, the Plaintiff claims that there was a streak mark on the ground caused by the contact with the rubber sole of her shoes when she slipped on the floor, and yet the photographs taken by the Plaintiff and Mr. Lau could not capture such streak mark. Whilst I accept that the cameras of their mobile phones might not be of very high quality, I still find it strange that the photographs could not capture the somewhat visible streak mark.
2. Further, I do not find Mr. Lau to be an impressive witness. He is evasive when he is asked about the actual loss of income suffered by him as a result of coming to court to testify. This certainly undermines the creditability of his evidence.
3. On the other hand, it does not appear to me that Mr. Lam and Mr. Tang of the Defendant are lying about what happened on the day of the accident. Despite the vigorous cross-examination by Mr. Lung, counsel for the Plaintiff, their evidence has remained unshaken after cross-examination. As I see it, the only logical reason why Mr. Lam and Mr. Tang have to lie is that they want to cover-up the accident. However, they are not evasive when they testify in court, and they frankly admit that there were previous incidents in which slippery floor had caused other passengers to fall on the ground. In such circumstances, I do not find that there is any logical reason as to why they have to cover up about what had happened in this particular incident. Further, they had conducted an investigation immediately after the accident and their finding was supported by the contents of the contemporaneous document, ie. the “UE Report”, prepared by Mr. Tang with the assistance of Mr. Lam shortly after the accident.
4. I have also considered the possibility that both the Plaintiff’s and the Defendant’s witnesses may be right. There might be a small patch of water on the ground which caused the Plaintiff to slip and fall. As the patch of water was very small in size, the Defendant’s witnesses might not have noticed it after the accident. However, I also have difficulty in reconciling such possibility with Mr. Lau’s evidence, who claims that the patch of water was quite large in size covering the area of a few floor tiles. Further, according to Mr. Lau’s evidence, some of the passers-by did mention to Mr. Lam about the water on the ground when he arrived at the scene to offer assistance to the Plaintiff. If that was true, it would have been most difficult for Mr. Lam to have missed the patch of water on the ground.
5. I must say that this is one of the few and unusual cases in which the court is facing difficulty in resolving the factual dispute between the parties and the evidence is very much in the balance. However, after considering all the evidence in this case, I have to come to the conclusion, with some reluctance, that the Plaintiff has failed to discharge the burden of proving that her version of events is more probable than that of the Defendant’s witnesses. There was still a strong possibility that the Plaintiff simply tripped by accident and fell on the ground. In such circumstances, the Plaintiff has failed to discharge the burden of proving that there was water on the ground at the material time.

*The statutory defence of entrusting the cleaning work to an independent contractor*

1. This would have been sufficient to dismiss the Plaintiff’s claim. However, assuming that I am wrong on the said factual issue and there was indeed water on the ground, I am of the view that the Defendant can still escape liability by relying on the statutory defence under s. 3(4)(b) of the Ordinance.
2. The relevant part of s. 3 reads as follows:

*“(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)-*

*… … …*

*(b) where damage is caused to a visitor by a danger due to the faculty 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. According to the *dicta* in the case of *Hsu Li Yun (suing as the administratrix of the estate of Lee On, deceased) v The Incorporated Owners of Yuen fat Building* [2000] 1 HKLRD 900, an occupier can rely on such statutory defence provided that the following 3 conditions are satisfied:
2. the occupier had acted reasonably in selecting and entrusting the work to the independent contractor concerned;
3. the occupier had taken reasonable steps to supervise the performance of the work by the contractor; and
4. the occupier had used reasonable care to check that the work undertaken by the contractor had been properly done.
5. Had the Defendant discharged such duty in the present case? In my judgment, the answer should be in the affirmative. According to Mr. Tang, the cleaning work of the Station was sub-contracted to one Winson Cleaning Services Co Ltd. (“Winson”) in June 2008, and the services provided by Winson had all along been above standard.
6. The workers of Winson would be responsible for cleaning every part of the Station. According to the well-documented staff attendance records, Winson had arranged 3 teams of workers to carry out cleaning work at the Station on the day of the accident in the 3 shifts from: (i) 7:00 am to 3:30 pm; (ii) 3 pm to 11:30 pm; and (iii) 11 pm to 7:00 am on the following day. There were 11 workers in each team, which included one foreman supervising the work of the team members. The workers of Winson would carry out the cleaning work in accordance with the scheduled timetable. According to the schedule of the 7:00 am to 3:30 pm shift on the day in issue, the floor of the South Concourse had been cleaned 3 times: once from 7:00 am to 9:00 am, once from 10:00 am to 12:00 noon and once from 1:00 pm to 3:00 pm. Further, if the cleaning workers found that the floor was wet or slippery, they would clean the floor with dry mop immediately. There was one member of the team assigned specifically for the cleaning work in the South Concourse on the day in issue.
7. The cleaning work of Winson was supervised by the Station Controllers and their staff, who would conduct regular inspections to ensure that the floor of the Station was dry and clean. In the morning of the day of the alleged accident, Mr. Tang and its staff patrolled the South Concourse at least on 3 occasions to ensure that the ground was dry and safe. The first time was by Mr. Lam when he prepared the Station for operation at about 5:40 am. Mr. Tang himself conducted the second inspection of the South Concourse at around 8:15 am, and the Concourse staff, Mr. L. Y. Chan (“Mr. Chan”), conducted another inspection of the floor of the South Concourse between 10:10 am to 11:20 am. After carrying out the said inspections, both Mr. Tang and Mr. Chan had made a record in the Station Controller Daily Inspection Checklist (“the Checklist”) to confirm that the floor was dry and clean during the time of their inspections.
8. Further, Mr. Tang would from time to time give instructions regarding the cleaning work in the Station to the foremen and the workers of Winson, and there were 2 formal meetings annually with the management staff of Winson to discuss various matters relating to the cleaning work in the Station.
9. According to Mr. Tang, another Concourse staff, Mr. M. W. Chow (“Mr. Chow”), should also have made an inspection of the floor of the South Concourse between 5:40 am to 7:50 am when he was on his way to inspect the entrances of the Station. However, as Mr. Chow was responsible for the inspection of the entrances and not the South Concourse on that day, he had not made a record in the Checklist that he had specifically inspected the floor of the South Concourse. Hence, I would not attach too much weight to this particular inspection by Mr. Chow.
10. Excluding the inspection by Mr. Chow, during the period from the commencement of the operation of the Station at about 5:40 am to 12:00 noon on the day in issue, the floor of the South Concourse had been cleaned twice and was inspected at least 3 times, not to mention to the inspection carried out by the foreman of Winson. Assuming that there was water on the floor at the material time, the water could only have been spilled by other passenger after the inspection by Mr. Tang at around 8:15 am.
11. Based on the uncontroverted facts mentioned above, I am of the view that the Defendant can rely on the statutory defence in s. 3(4)(b) of the Ordinance. First, one must appreciate that the liability under the Ordinance is not a strict one. The Station was a public place assessable 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 sub-contracted 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.
12. On this issue, the *dicta* of the Court of Appeal in *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd. trading as The Excelsior*, unreported, CACV No. 38 of 2000 (decision on 22 November 2000) are of particular relevance. In that case, the plaintiff slipped and fell in the lobby near the side entrance of the defendant’s hotel. On the day of the accident, there were more people than usual in the vicinity of the hotel as there was a fireworks display in the harbour to celebrate National Day. In a claim for negligence and breach of the occupier’s duty, the trial judge ruled the case in the plaintiff’s favour. However, the decision was reversed by the majority of the Court of Appeal.
13. The majority of the Court of Appeal allowed the appeal on different grounds. Mayo VP refused to disturb the trial judge’s findings on fact in the plaintiff’s favour about the occurrence of the accident, but held that the defendant had discharged the common duty of care by having adopted a reasonable system of work relating to the cleaning of the floor of the hotel lobby. Rogers VP reversed the trial judge’s findings of fact about the occurrence of the accident. On the other hand, Stock JA, who was in the minority, accepted the trial judge’s findings both about the occurrence of the accident and the failure on the part of the defendant to prove that there was an adequate system of work.
14. Although the defendant in the *Cheung Wai Mei* case had not engaged an independent contractor to perform the cleaning work, there is no reason why the *dicta* of the Court of Appeal about the nature of the occupier’s duty and the principle of reasonableness are not applicable in the present case. In this regard, Mayo VP said the following:

*“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.”* (at p. 8)

On the other hand, Rogers VP made the following observations:

*“… … … 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.”* (at p. 17)

Even Stock JA, who was in the minority, reinstated the same point in his judgment:

*“… … … Emphasis must be placed on the word ‘reasonably’, and the standard must not ne such as to impose absolute or automatic liability on a defendant in such circumstances.”* (at p. 23)

1. Based on the facts of the present case, I accept that the Defendant had set up a reasonable and proper system to ensure that the Station was safe for the passengers to use and it had taken reasonable steps to ensure that the cleaning work was done properly. In such case, even if there was water on the ground when the Plaintiff fell on the day of the accident, the Defendant had properly discharged the common duty of care under the Ordinance.
2. 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, as in what happened in the cases of *Tang Po Ling v Chan Po trading as Corrytron Cateries*, unreported, DCPI No. 179 of 2007 (decision of HH Judge H C Wong on 20 August 2008) and *Cheung Yuet Har v Force Team Ltd. trading as Hoi Tin (Asia) Harbour Restaurant*, unreported, DCPI No. 44 of 2009 (decision of HH Judge Leung on 24 February 2010). 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.
3. In his submissions, Mr. Lung tries to argue that the Defendant’s purported defence is fatal for the following reasons. Firstly, the Defendant has not adduced any evidence about the details of the tendering process in selecting Winson as the cleaning contractor, and so Mr. Lung submits that the Defendant has failed to discharge the burden of proving that it acted reasonably in selecting and entrusting the cleaning work to Winson, which is the first condition for the application of the statutory defence as laid down in the *Hsu Li Yun* case (see paragraph 24 above). Secondly, the Defendant has not arranged any person from Winson to testify in court, and so there is no evidence to show that the cleaning contractor had performed its duty properly on the day of the accident.
4. Despite the able submissions of Mr. Lung, I do not accept his arguments for the following reasons. Firstly, whether Winson was a competent contractor can be determined by reference to different sorts of evidence, for example its work performance in the Station after obtaining the contract, and it is not absolutely necessary for the Defendant to arrange the particular staff responsible for selecting Winson to give detailed evidence about the tendering process. According to Mr. Tang, Winson was chosen as the contractor through a proper tendering process and the services provided by Winson had all along been above standard. Further, there was a scheduled timetable for the cleaning work at the Station, and Winson had kept proper attendance records for its staff working at the Station. In my judgment, this would have been sufficient for the court to infer that Winson was a competent contractor and it was reasonable for the Defendant to have entrusted the cleaning work of the Station to Winson.
5. Secondly, although the Defendant has not arranged any workers from Winson to testify in court, Mr. Tang testifies that: (a) Winson had a proper system of work of cleaning the floor of the Passenger Concourse on the day of the accident; (b) Winson had arranged 11 workers to work in the Station in accordance with the work schedule; and (c) Mr. Tang and its sub-ordinates did conduct adequate inspections to ensure that the workers of Winson had carried out the cleaning work properly. Mr. Tang’s evidence is also supported by documentary evidence such as the staff attendance records of the workers of Winson, the scheduled timetable for the cleaning work at the Station and the Checklist on the day of the accident.
6. In *Cheung Wai Mei*, only the housekeeper of the hotel gave evidence in court about the system of the cleaning work in the hotel lobby. Based on her evidence, the majority of the Court of Appeal accepted that there was a proper system of work without the evidence from the actual worker responsible for the cleaning work in the lobby on the day of the accident. Even in the minority judgment, it seemed that Stock JA did not require the defendant to arrange all the relevant workers to testify in court. As I see it, the lack of supervision or inspection of the cleaning work and the lack of proper records were the main reasons why Stock JA accepted the finding of the trial judge that there was no proper system for the cleaning work at the material time.
7. The present case is quite different. The staff of the Station conducted regular inspections to supervise the cleaning work of Winson and the whole system of work and inspection is supported by proper documentation. Under such circumstances, the court is entitled to draw an inference that the workers of Winson were performing their work properly on that day. Coupled with the fact that Defendant had a proper and reasonable system to supervise the cleaning work of Winson, this would have been sufficient for the Defendant to rely on the statutory defence to escape liability in the present case.
8. Finally, I would like to add one more observation. In *Cheung Wai Mei*, there was an issue as to whether there was some accumulation of liquid in the coconut matting near the entrance of the hotel. Mayo VP expressed doubt that, even if a person had been stationed at the entrance, whether he would necessarily have detected the discolouration in the matting when exercising a reasonable degree of vigilance. That was quite different from the presence of deposit of yoghurt on the floor of a supermarket as in what happened in *Ward v Tesco Stores Ltd.* [1976] 1 WLR 810. In the present case, even accepting the evidence of the Plaintiff, there were only tiny droplets of water on the floor at the time of the accident. The droplets of water might not be clearly visible and that was why Mr. Lam could not find the presence of water on the ground when he later arrived at the scene. Hence, even if the Defendant or Winson had stationed a person at the *locus in quo* at the relevant time, I wonder whether he could have necessarily detected the presence of such water when exercising a reasonable degree of vigilance.
9. Based on the aforesaid analysis, even assuming that there was water on the ground which caused the Plaintiff to slip and fall on that day, the result of the case would be the same. Despite all the sympathy I have with the Plaintiff, I simply cannot grant judgment in her favour. I therefore dismiss the Plaintiff’s claim. I also make an order *nisi* that the costs of the action be to the Defendant with certificate for counsel, which shall be made absolute 14 days after the date of the handing down of this judgment.
10. Finally, I would like to express my gratitude to both counsel for all the assistance that they have rendered to this court.

(David Lok)

District Judge

Mr. Vincent Lung, instructed by Messrs. Li & Lai, for the Plaintiff

Mr. Ashok Sakhrani, instructed by Messrs. Deacons, for the Defendant