## LA/MPI/16549/008 (AJ 25)

## DCPI 956/2009

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 956 OF 2009

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BETWEEN

WONG CHEUNG CHUNG Plaintiff

and

MTR CORPORATION LIMITED Defendant

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

Coram: H.H. Judge Chow

Date of Trial : 8th and 14th June 2010

Date of handing down Judgment: 2nd July 2010

JUDGMENT

1. This is the Plaintiff’s claim for damages in respect of the injuries suffered by him in an incident (“the Incident”) which occurred on 6.2.2008, due to the Defendant’s negligence and breach of statutory duty under the Occupier’s Liability Ordinance. The Defendant denies such allegations and avers that the Plaintiff was wholly responsible for the occurrence of the Incident.

The Plaintiff’s evidence

1. On 6.2.2008, shortly after 1:00 a.m., the Plaintiff was closing an electric gate of the SOGO Department Store connecting to the Causeway Bay MTR Station. Two co-workers were helping him to check that all customers had left SOGO before he closed the electric gate. After it had been activated to come down, the 2 co-workers left him, and headed for Exit D1. The electric gate came down slowly, and it took about 1 minute to be closed completely.
2. Having closed the electric gate and checked that everything was in order, the Plaintiff went towards Exit D1. His two co-workers were not in sight. When he was several tens feet away from Exit D1, which is at the top of two flights of stairs, he saw a MTR station staff closing a sliding metal gate at Exit D1. He shouted to the MTR staff to wait for him. The MTR staff then re-opened the metal gate to a width of about 3 to 4 feet. The MTR staff mumbled something to the effect that it was troublesome, and that he (the Plaintiff) was to settle it himself. Then the MTR staff left Exit D1. At this moment the Plaintiff was hurrying up the stairs. Lighting was dim in that area. Upon reaching the level landing on the top of the stairs he looked forward for Lockhart Road. The landing was short, and it would take him 2 or 3 steps to walk past it before going down the stairs on the other side. He had taken this route many times before, but not as late as this hour of the day. After walking for 1 or 2 steps his right foot tripped over something and he lost his balance. At about this time he saw that he had tripped over a raised gate rail on the floor at the base of the metal gate. He stumbled down 5 or 6 steps on the other side of the landing and landed on his right face, right arm and right knee on Lockhart Road. He felt very painful and lost consciousness for a short moment. When he came round he was surrounded by some passers-by. They shouted for help. Two workers from the SOGO security office came out to help the Plaintiff to go into the security office. But they were not the 2 co-workers who were working with him when he was closing down the electric gate. The 2 SOGO workers reported the Incident to SOGO and summoned for ambulance.
3. The Plaintiff was bleeding on his right face. He could not walk and was helped up by these 2 SOGO workers. He did not see the MRT station staff at the scene after the Incident.
4. Photographs taken by the Plaintiff’s friend sometime in February 2008 show that lighting was dim at Exit D1 at the closing of MTR. A photograph taken by the Plaintiff himself of Exit D1 at the time of MTR closing in early 2009 shows that the area around Exit D1 was much brighter than the time of the Incident.
5. He had walked through Exit D1 many times before the Incident, but he had never done so when the gate was closed. He did not know that a raised gate rail about 2 to 3 inches in height would be placed across the level landing at Exit D1.

Evidence of the Defendant

1. Mr. Lee Siu Yin (“Lee”) testified for the Defendant. He said that just before the incident happened, he was closing the gate at Exit D1. It took him about 1 minute to put the rail on the floor of the landing and close the gate. At this time he saw 3 SOGO staff running towards him; they asked him to wait for them. Two of them were running in front, and one was running in the rear, at a distance of about 10 bodies apart. He stopped closing the gate. He said loudly and slowly in a mechanical tone “小 …… 心 …… 路 …… 軌” (which means “beware of the rail”) to the 2 SOGO workers in front when they reached the level landing at the top of the steps. He said the same thing again in the same loud, slow and mechanical tone to the Plaintiff when he reached the top of the staircase on the level landing at Exit D1. The Plaintiff asked him if he was about to go off duty. He answered “Yes”. Then the Plaintiff fell onto the ground. Upon seeing that he helped the Plaintiff to get up. The 2 co-workers came back to help the Plaintiff. They told the Plaintiff not to cause so much trouble (“唔好攪咁多嘢”). Then they took him to the security office of SOGO by the side of Exit D1. He thought that the Plaintiff was not injured. So he left. He made a written report of the Incident on 7.2.2008, after SOGO had reported the Incident to the Defendant.

Analysis of the evidence

1. Lee was adamant that he had reminded the 3 SOGO workers 2 times by saying “小 …… 心 …… 路 …… 軌”. But in his witness statement, there is no reference to mentioning the warning twice. When he saw the SOGO workers, they were running towards the staircase. He must have worried that they might trip over the gate rail. That is why he uttered “小 …… 心 …… 路 …… 軌”. If this is true, this worry must have gone through his mind very quickly because when he saw the SOGO staff, they were running, and were at a short distance from the staircase. If that is the case, very naturally what passed his mind must have been reflected in what he said. The worry must have gone through his mind quickly, and so when he spoke, naturally he would utter the words quickly, and in a worried tone. But this was not reflected by his demonstration in court. When he uttered the warning, it was mechanical, and devoid of passion. It simply does not reflect his worry and concern for these workers.
2. Lee uttered the 4 words “小 …… 心 …… 路 …… 軌”slowly and mechanically. It took him about 1 second to say each word. The 4 words would take about 3 to 4 seconds to be uttered. According to him the Plaintiff asked him if he was about to go off duty, and Lee replied “yes”. This short dialogue would take 2 to 3 seconds to be completed. In total it would require at least 5 to 6 seconds to utter all these things. But it only took the Plaintiff 1 to 2 seconds to walk across the level landing at Exit D1. It is simply impossible for all these things to have been spoken (which would take about 5 to 6 seconds) within 1 to 2 seconds before the Plaintiff fell down to the ground.
3. On Lee’s own evidence, when he said “小 …… 心 …… 路 …… 軌” to the Plaintiff, the Plaintiff had already reached the top of the stairs at the level landing. He took 1 or 2 steps forward and then he fell down. It would take him 1 or 2 seconds to walk across the level landing. But it would take 3 or 4 seconds for Lee to complete the speaking of “小 …… 心 …… 路 …… 軌”. So even assuming what Lee said is true, before he completed uttering out the warning, the Plaintiff had already tripped over the gate rail and fallen down. Hence the warning was not given in sufficient time for the Plaintiff to take heed of the raised gate rail.
4. Lee’s evidence on the reaction of the 2 co-workers upon their returning to the spot where the Plaintiff fell is not believable. Instead of asking the Plaintiff whether he sustained any injury, they said to the Plaintiff “not to cause so much trouble”. The fact is that Plaintiff did fall to the ground. Anyone seeing that would have sympathy for him for his falling down. Instead they asked him not to cause so much trouble. There cannot be anything at or shortly before that moment which would create in their minds that the Plaintiff was causing trouble. Lee’s evidence in this regard is wholly incredible.
5. After the Plaintiff had fallen down, obviously he was severely injured at that time, as shown in the subsequent medical examinations that his right hand was fractured at several places. His right face also bumped against the ground. He must be suffering from great pain at that time. Hence he must have much difficulty to get up. His body movements must have reflected that he was suffering from serious injuries at that time. On p. 132 of the Trial Bundle, which is a record of physical examination of the Plaintiff when he was at the Accident & Emergency Department of the Ruttonjee and Tang Shiu Kin Hospital, there is a note “® face red in colour”. There is also a human figure with a black dot on the right face. The black dot indicates where the redness was on his right face. His right face was injured and so it was in red, red being the colour of blood. So whilst at the scene of Incident his right face must be bleeding. Lee talked to him there. So he must have seen that his face was bleeding. Yet he saw that nothing really had happened to him (meaning he was not injured). So he left. If he had been there after the Plaintiff’s fall, definitely he would not have said that. I have no doubt that he was not there when the Plaintiff was injured. What the Plaintiff said in this regard is truthful.
6. There is a conflict in the Plaintiff’s evidence as to whether the electric gate was on the street level or below the street level. This is not directly related to the crux of the matter which is what was happening at the staircase and the level platform at Exit D1. It is not such a conflict that would destroy his credibility. The Defence Counsel submits that the Plaintiff sought to exaggerate the time gap between the time when he left and the time when his two colleagues left, so as to suit his case that there was nobody around when he tripped and fell. There is not sufficient evidence to support that allegation.
7. The Defence Counsel submits that another incident showing that the Plaintiff was exaggerating and incredible is his evidence that his head was bleeding heavily after he had fallen down. Contemporaneous medical records and the Plaintiff’s own evidence showed that there was no bleeding over his head. There is no reference to bleeding over his head in the medical records and the Plaintiff’s evidence. The medical records do not say that there is no bleeding. It depends on what the doctors regard as being required to be recorded. For example, p. 299 is the medical report compiled by Dr. Hon Siu-kei Sam about the conditions of the Plaintiff when he was in the Accident & Emergency Department of Ruttonjee & Tan Siu Kin Hospitals. Dr. Hon did not mention anything about the Plaintiff’s face. But on p. 132, under the column of “Physical Examination” there is a note of “® face red in colour”. This must be a result of the Plaintiff’s right face hitting the ground causing it to bleed. Again, whether the Plaintiff mentioned bleeding over his head depends on whether he was asked in this regard. In any event, the Plaintiff’s right face must be bleeding, after it had hit against the ground.
8. The Defence Counsel argues that if Lee had not been present at the Incident, he could not have given the details in his report dated 7.2.2008. Lee was at Exit D1 and saw the 2 co-workers leaving first. He then saw the Plaintiff approach Exit D 1 shortly afterwards. He had left Exit D1, before the Plaintiff fell down. He knew afterwards upon SOGO’s report to MTR on the Incident. He must have known something about the conterts of the said report. So it would not be difficult for him to write his report on the Incident.
9. The fact that nothing occurred to his 2 co-workers who made use of Exit D1 cannot be used as evidence to show that the Plaintiff was negligent, because there is no evidence to show the circumstances of the Exit D1 when his 2 co-workers used it.
10. The Defence Counsel submits that the Plaintiff put forward 2 different and irreconcilable versions about the oral communications between him and Lee. In the Reply the Plaintiff’s case was that after opening the gate partly, Lee went away without saying anything. But in his witness statement, the Plaintiff said that Lee mumbled loudly about how troublesome the Plaintiff was, and told the Plaintiff to settle it himself. The Reply was drafted by his Solicitors. It is not evidence. I cannot find that the Plaintiff gave 2 pieces of evidence conflicting with one another, so that an inference of lie can be drawn. His evidence is at variance with the Reply, but on the whole of the evidence presented in Court, the Plaintiff’s evidence is credible, on the balance of probability. In particular I attach weight to the evidence that his face was bleeding, which Lee must have noticed at the scene.
11. When Lee placed the raised gate rail on the level landing he should warn passers-by in sufficient time so that they would not trip over the gate rail. This is particularly so because the lighting at that spot is dim, so that passers-by could pay attention to the ground in front of them. It is reasonably foreseeable that passers-by walking towards Exit D1 would trip over the gate rail and fall, unless a sufficient warning is given in good time. The Defendant failed to do that. Hence it is liable for the Plaintiff’s fall, which caused him to sustain bodily injuries.
12. There is no contributory negligence on the part of the Plaintiff. When he was on the level landing, there is no handrail by the side of the wall for him to hold on. The Plaintiff cannot be held contributory negligent for failing to see the gate rail. Never before had he come across a raised gate rail at that spot which he walked through many times before. He fell after taking 1 or 2 steps forward upon reaching the top of the stairs. He could not be expected to notice a raised gate rail on the ground of the level landing at a short distance ahead of him, where the lighting was dim.

Quantum

1. The Plaintiff was born on 23.6.1949. He was aged 58 at the time of the incident. He is now 61 years old.

Injuries, treatment and disabilities

1. He suffered the following injuries:-
   1. comminuted fractures of the right elbow, right distal radius; gross tenderness and deformity at right elbow;
   2. tenderness and swelling at right wrist;
   3. soft tissue swelling at the right periorbital and occipital scalp region;
   4. a fracture of the right orbital floor.
2. He was hospitalized for over a month and discharged on 8.3.2008. In February 2008, he had an operation to his right elbow, and removal of the external fixator in April 2008, and removal of implants from the right elbow and wrist in March 2009. He continues to suffer from knee pain.
3. Sick leave was granted from 6.2.2008 up to 2.12.2009. The doctors who issued the sick leave certificates are in the best position to decide whether he shall have sick leave certificates, because they medically examined him, and made the decision according to the actual circumstances. The sick leave is reasonable. The Plaintiff underwent an operation of the removal of implants from the right wrist and elbow in March 2009. For that, the Plaintiff needs sick leave. This simply proves that he needs sick leave more than 1 year.
4. The Plaintiff has been suffering from swelling, pain, weakness and stiffness at the right hand. The active range of the movements of the injured arm and hand was limited. He also has stiffness in his fingers and cannot make a full fist. The pain in the right knee is aggravated by fast or prolonged walking or walking on stairs.
5. Orthopaedic experts Dr. Fu Wai Kee and Dr. Henry Ho agreed that the Plaintiff’s right elbow injury was a severe one, and has resulted in post-traumatic degenerative osteoarthritis. Permanent impairment of the whole person in respect of the right arm injuries and disabilities is assessed at 20% and 17% respectively by the experts.
6. Before the incident, the Plaintiff enjoyed good health and was sociable. He did exercise in the fitness center once or twice a week. He cannot do it anymore because of the disabilities suffered by him. He has become depressed and withdrawn. Because of his disabilities he cannot resume his former job which required constant patrol and handling heavy weight. After the sick leave ended on 2.12.2009 he resigned from his former job. He attempted to find light jobs, but all failed because of his disabilities.
7. His pre-accident monthly earning is $9,425 (basic salary $7,500 x 13/12 + attendance bonus $300 + meal allowance $500 + overtime $500). From 1.4.2008 his monthly basic salary was increased from $7,500 to $7,800. So his pre-trial monthly earnings after 1.4.2008 should be $9,750 ($7,800 x 13/12 + $300 + $500 +$500).

PSLA

1. In Yu Pun Yuen v Ng Kwok Man & Ors HCPI 293/2002, the Plaintiff fell down from the 4th or 5th step of a ladder when he was descending from it. He suffered a fracture of the distal right radius and ulna. The fracture was managed with plaster of paris cast after closed reduction. In December, 1999, arthroscopy of the right shoulder showed complete rupture of long head biceps and interval tear between the subscapulars and supraspinatus tendon. Open repair of the right shoulder rotator cuff was performed in January, 2000. He was given sick leave totalling 686 days. The court awarded him $450,000 under PSLA. In view of the serious injuries and disabilities suffered, an award of $440,000 is reasonable and appropriate.

Pre-trial loss of earnings and MPF benefits

1. For the period from 6.2.2008 to 31.3.2008, the loss under this head is $18,196.33 ($9,425 x 1 26/31 months x 105%). For the period from 1.4.2008 – 14.6.2010 the loss is $271,634.99 ($9,750 x 26 16/30 months x 105%). The total loss is $289,831.32 ($18,196.33 + $271,634.99).

Future loss of earnings and MPF benefits

1. The Plaintiff can work up to 70 years old. He has a residual working capacity of earning $5,500 per month. The Plaintiff claims to adopt a multiplier of 5. That is reasonable. Hence the loss under this head is $267,750 (($9,750 - $5,500) x 5 x 12 x 105%).

Loss of earning capacity

1. The Plaintiff claims for $80,000 as damages for loss of earning capacity. In Mocliker v. A Reyrolle & Co. Ltd. [1977] WLR 132, the Court said:-

‘Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether there is a “substantial” risk or is it a “speculative” or “fanciful” risk …… If the court comes to the conclusion that there is no “substantial” or “real” risk of the Plaintiff losing his present job during the rest of his working life, no damage will be recoverable under this head.’

1. The Applicant is not working at the date of the trial. In fact from the expiry of the sick leave up to the trial day, he did not have any work because he was unable to find any job to do. Hence there is no risk for him to lose any job, because he has not had a job at all. So there cannot be any award for him under this head. In any event, this head of claim is in duplicity with the claim under “future loss of earnings and MPF benefits”. An award is made in respect of the latter. Hence no award should be made under this head of claim.

Miscellaneous expenses incurred

1. The Plaintiff claims $28,457 for miscellaneous expenses incurred and paid by him as a result of the injuries suffered by him due to the accident:-

(1) medical expenses $10,000

(2) Chinese doctors and medication $1,000

(3) travelling expenses $1,500

(4) tonic food $6,000

(5) paid fitness center fees $8,361

(6) spectacles damaged in the accident $1,596

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$28,457

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Summary of awards

1. (1) PSLA $440,000.00

(2) pre-trial loss of earnings & MPF $289,831.32

(3) future loss of earnings & MPF $267,750.00

(4) miscellaneous special damages $28,457.00

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$1,026,038.32

Less: Employees’ compensation received $282,302.98

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$743,735.34

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1. I make an order that the Defendant do pay, within 14 days from today, the sum of $743,735.34 to the Plaintiff, with interest thereon: interest on the sum of $440,000 at 2% p.a. from 30.3.2009 until 1.7.2010; and interest on $35,985.34 ($289,831.32 + $28,457 - $282,302.98) at 50% judgment rate, from 6.2.2008 until 1.7.2010; interest on the sum of $743,735.34 at judgment rate from 2.7.2010 until satisfaction.

Costs

1. I make an order nisi, to be made absolute in 14 days’ time, that the Defendant do pay costs of this action, to the Plaintiff, to be taxed, if not agreed, with certificate for Counsel. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

( S. Chow )

District Judge

The Plaintiff: represented by Miss Phillis Lok, instructed by Messrs. Cheung Wong & Associates, Solicitors.

The Defendant: represented by Mr. Patrick Szeto, instructed by Messrs. Deacons, Solicitors.