## DCPI 1234/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1234 OF 2012

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##### BETWEEN

ASIF MUHAMMAD Plaintiff

### and

MTR CORPORATION LIMITED Defendant

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Before: His Honour Judge Andrew Li in Court

Dates of Hearing: 10, 11 & 13 February 2014

Date of handing down Judgment: 14 March 2014

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JUDGMENT

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1. This is a personal injury claim brought by the plaintiff against the defendant arising out of an alleged “slip-and-fall” accident at the Kwai Hing MTR Station (“the Station”).

*BACKGROUND*

1. The plaintiff is an asylum seeker in Hong Kong. He claims that on 12 August 2010, sometime after 10:30 am or thereabouts, having boarded a train at the Tsuen Wan MTR station earlier, he alighted at the Station and was descending the staircase from the platform to the concourse level (“the Staircase”), the Station being an aboveground station, when he slipped and fell on the Staircase. He alleges that he stepped on some water on the 2nd step of the 2nd flight of the 3-flight Staircase. He slipped and fell backward on his left hand side. His back and left side of his body including his head, neck, left arm and left foot allegedly landed on the stairs. He allegedly slipped downwards on his back all the way to the bottom of the 2nd flight landing of the stairs. He also alleges that he had lost consciousness for a short period of time.
2. The usual allegations of negligence and/or breach of common duty of care under section 3 of the Occupiers Liability Ordinance, Cap 314 (“OLO”) have been pleaded in the statement of claim against the defendant.
3. The defendant does not dispute the fact that the plaintiff was found at the bottom of the Staircase leading to the concourse (“the Concourse”) from Platform 2, which is the platform for trains travelling from Tsuen Wan towards the Central direction (“the Platform”). However, it specifically denies that the plaintiff proceeded to the Staircase after alighting from a train at the Station. Further, the defendant makes no admission to the circumstances leading to the accident and puts the plaintiff to strict proof of each and every allegation regarding the accident itself. It also denies the accident was caused by the negligence and/or breach of common duty of care under section 3 of the OLO. The defendant further alleges that there was regular cleaning and inspection of the Staircase undertook both by its own staff and the cleaning contractor engaged by the defendant. As such, the defendant says that it has discharged its duty of care owed to the plaintiff.
4. In particular, the defendant avers that:-
5. regular inspection at different areas of the Station, including the Staircase, was conducted by the station staff;
6. a professional cleaning contractor ie Waihong Environmental Services Limited was engaged by the defendant to perform regular cleaning duties at designed areas of the Station, including the Staircase;
7. shortly before the plaintiff’s alleged slip-and-fall accident, the Staircase had been inspected by different members of the defendant’s staff and cleaning worker and no water or slippery substantive was found on the Staircase;
8. upon review of the CCTV recording of the Platform by the defendant’s staff after the alleged accident, it was found that the plaintiff and a Pakistani male by the name of Nazar Hussain (“Hussain”), who in fact reported the alleged accident to the staff of the Station, were seen travelling up on the escalator from the Concourse to the Platform and then loitering at the upper landing of the Staircase on the Platform, prior to the alleged accident; and
9. the plaintiff alleged slip-and-fall accident was reported to the police by the defendant for investigation after the review of the CCTV footage by the staff of the defendant.
10. The plaintiff claims to have suffered injuries that have now left constant pain of 5/10 degree of severity and inability to lift more than 5 kg of weight. However, as an asylum seeker in Hong Kong who is on police recognizance, he is not lawfully permitted to work in Hong Kong. This has been his status since his arrival in Hong Kong in 2008.
11. In the present proceedings, the plaintiff was initially represented by a firm of solicitors assigned by the Director of Legal Aid (“DLA”). Hence, the statement of claim, the statement of damages, the plaintiff’s witness statement and the revised statement of damages (“RSD”) were all prepared by the assigned solicitors on his behalf. However, not long after the defendant has filed its list of documents, disclosing, *inter alia*, copies of compact disc containing the CCTV recording, the legal aid certificate granted to the plaintiff was discharged by the DLA. A notice to act in person was filed on 9 July 2013. Under the RSD, the plaintiff is now claiming a total sum of HK$611,550, which included the claim for loss of accrued earnings at HK$64,250; loss of future earnings at HK$216,000; loss of earning capacity at HK$80,000; special damages at HK$1,300 and general damages for pain and suffering and loss of amenities (“PSLA”) at HK$250,000.
12. The defendant in its answer to the RSD denies that the plaintiff is entitled to any claims for the loss of accrued earnings, loss of future earnings and loss of earning capacity. Subject to the issue of liability, it contends that an appropriate award for PSLA should be at no more than HK$100,000. The special damages have been agreed at HK$1,300, subject to documentary proof.

*DISCUSSION*

*On the Issue of Liability*

1. On the issue of liability, the central question is: did the accident happen in the way as described by the plaintiff? If so, is the defendant liable for any breach of duties on its part.

*Did the accident happen in the way as described by the plaintiff?*

*The plaintiff’s version*

1. The plaintiff is the only witness who has testified at the trial for his own case. He states that the accident happened on the 12th which was a Friday in 2010 but he could not recall the month of the year. He says that he was sure that it was a Friday because it was the first day of the Ramadan, ie the Muslim fasting month. He states that he had come from Tsuen Wan on that day eventhough he was living in Shamshuipo at the time. He says that he went to meet a friend at the Tsuen Wan MTR station that morning. The name of that friend according to him was Mushtaq Ahmed (“Ahmed”). He says that he had agreed with Ahmed to go to a small mosque in Kwai Chung to perform prayers together and he was told by Ahmed that somebody would join them later. The plaintiff claims that he did meet up with Ahmed at the Tsuen Wan MTR station that morning. He was allegedly within the ticketed area and Ahmed was outside in the public area of the Concourse. They had a conversation over the railing with each other before Ahmed allegedly received a phone call and have to attend an interview with the International Social Services. Once Ahmed left, the plaintiff says that he then contacted another friend by the name of Mazhar Iqbal (“Iqbal”) and arranged to meet him in Kwai Hing.
2. Just prior to the accident, the plaintiff claims that he had arrived the Station on a train from the Tsuen Wan direction. He also claims that he was travelling alone when he arrived the Station. The plaintiff claims that after he arrived the Station, he went from the Platform down to the Concourse. Upon seeing that his friend Iqbal was not there, he then went back to the Platform. He also claims that after he returned to the Platform, he talked to Iqbal on the mobile phone and was told by his friend to go down to the Concourse again. That was when he slipped and fell on the steps of the Staircase.
3. He says that the accident took place on the 2nd flight of the Staircase. He allegedly had slipped on the 2nd step of the 2nd flight and fell around 15 to 16 steps all the way to the bottom of the 2nd flight where the landing between the 2nd and 3rd flight of the Staircase was situated. The plaintiff says that he felt something on the floor and he could see there was water on the floor before he slipped and fell on the stairs. After he fell, he became unconscious and he did not know who had called the ambulance. When he regained consciousness, he claims that there was a lot of people surrounding him including MTR staff and the ambulance crew. He claims that the first time he was aware of the presence of Hussain was when the ambulance crew asked Hussain to interpret for him. Before that, the plaintiff claims that Hussain was merely a passerby whom he had exchanged a simple greeting while he was on the Platform. The plaintiff insists that he did not know Hussain and he was not a friend of his.
4. Under cross-examination, the plaintiff was not able to explain satisfactorily why he had come from Tsuen Wan on that day. He was also not able to explain exactly when did he arrive the Station on the train from Tsuen Wan. While the plaintiff insisted that the accident happened on a Friday as he had arranged with Ahmed and Iqbal to attend the Friday prayers in the mosque in Kwai Chung, of course, the calendar actually reveals that 12 August 2010 was in fact a Thursday and not a Friday.
5. Also under cross-examination, the plaintiff admits that after he had met his friend Ahmed at the Tsuen Wan MTR Station that morning, they went their separate way and he then travelled on the train to Kwai Hing where he was supposed to meet his other friend Iqbal. He claims that he was supposed to meet Iqbal in Kwai Hing in order to travel to the mosque in Kwai Chung together. However, he is not able to say where this mosque in Kwai Chung was located and why he had to travel from Shamshuipo to Tsuen Wan first before going to Kwai Hing.
6. After arriving the Station, he says that he alighted from the train and went down to the Concourse from the Platform. The plaintiff claims that when he went down to the Concourse for the first time, he tried to call his friend Iqbal on the phone but he did not answer. When he called him again, he also did not pick up the phone. After he returned to the Platform, Iqbal eventually called and told the plaintiff that he was taking a shower earlier and therefore could not answer his calls. He supposed to have told the plaintiff to go down to the Concourse again. It was allegedly during this journey when the accident happened.
7. The plaintiff confirmed that it was not raining and the weather was dry on the day when the accident happened.

*The CCTV recording*

1. Despite what the plaintiff told his previous assigned solicitors, little did the plaintiff realize then that every movement of his and Hussain on the Platform had been captured by the closed-circuit television (“CCTV”) situated at two different locations on the Platform.
2. Although there was no CCTV recording capturing the view within the Staircase itself, the high resolution images from the 2 separate cameras on the Platform clearly depicted what the plaintiff and Hussain were doing at the time. The recording are contained in 2 different clips which I shall, for the sake of convenience, call them Clip No.1 and Clip No.2.
3. Clip No 1 shows images from an easterly direction, ie showing the trains heading towards the Central direction leaving the Platform. Below is a summary of what can be seen from that clip:-

“10:44:35 Hussain and the plaintiff emerged from the ascending escalator at the far end of the Platform. The plaintiff was seen walking about 3 to 4 steps behind Hussain. Hussain was holding a plastic bottle of water in his hand.

10:45:10 Hussain stopped by the side of the parapet wall of the Staircase, leaned over and looked around the bottom of the Staircase for a few seconds.

10:46:15 Hussain emerged from the ascending escalator again while talking on the mobile phone. He was seen taking a quick gulp of the water from the plastic bottle before quickly disposed the bottle in the rubbish bin placed alongside the wall.

10:46:58 Hussain leaned his head forward over the parapet wall and looked into the bottom of the Staircase again. He stopped talking on the phone and started running towards the Staircase.

10:47:25 Other passengers on the Platform apparently were attracted by the commotion coming from the Staircase and began to look at the bottom of the Staircase from the side of the parapet wall.

1. Clip No 2 is the CCTV capturing images from a westerly direction, ie showing the Central bound trains approaching the Platform. The following is a summary of the images shown in this clip:-

“10:45:02 Hussain was seen leaning over the parapet wall and looked in the Staircase while still holding the bottle of water in his hand.

10:45:28 Hussain was seen speaking to the plaintiff briefly at the top of the Staircase. He seemed to have muttered something to the plaintiff which the plaintiff has acknowledged by nodding his head. The plaintiff then took out his mobile phone from his pocket while Hussain proceeded to walk down the Staircase with the plastic bottle still in his hand.

10:45:47 The plaintiff was seen talking on the telephone and lingering around the top of the Staircase where he looked down from time to time.

10:46:18 The plaintiff was seen walking down the Staircase slowly while still talking on the phone.

10:46:59 Hussain was seen running towards the Staircase (from the direction of the escalator), he first took a look at the Platform Supervisory Booth (“PSB”) before looking at the bottom of the Staircase. There was no water bottle in his hand by now but he was seen holding a mobile phone in his hand (but not talking on the phone).

10:47:32 Hussain was seen running back up from the Staircase and went to the PSB to alert the staff stationed inside.

10:47:52 Hussain was seen running back down to the Staircase with his mobile phone still in his hand.

10:48:01 The MTR staff came out from the PSB and started running down the Staircase.

1. Although the time shown in the 2 different cameras was slightly different due to the different built-in digital clocks used, it is clear that the images on the 2 recording synchronize with each other. They show exactly what the plaintiff and Hussain were doing from the moment they emerged from the escalator on the western side until the moment the plaintiff walked down the Staircase on the eastern side, followed by Hussain running back from the escalator back to the Staircase and then re-emerged from the Staircase again to seek help from the staff at the PSB.

*Evidence from the staff of the defendant*

1. The defendant has called 2 members of its staff to give evidence at trial. They are Mr Sun Kwok Keung (“DW1”) and Mr Tam Wai Ho (“DW2”). They were both working as the Senior Station Control Officer at the Station at the time of the accident. Part of their duties as Senior Station Control Officer at the Station was to oversee the daily operation of the Station. These would include ensuring that all the facilities are in safe and proper working condition; monitoring the performance of the cleaning contractor; and providing any necessary assistance to passengers.
2. DW1 was on duty as the Station Controller on the day of accident. He would normally station at the Control Room located on the concourse level. On the day of the accident, he was on the morning shift where he commenced work at 5:45 am. He confirms that there is only one staircase leading from the Platform down to the Concourse while there are two set of escalators leading up from the Concourse to the Platform. He would normally patrol the entire Station from 6:00 to 6:45 am which would include the Concourse, the Platform and the Staircase. He would carry out another patrol from 8:00 to 9:15 am which again would cover the Concourse, the Platform and the Staircase. From the “Station Controller Daily Inspection Checklist” kept by the defendant for the date of accident, DW1 was able to confirm that the floor of the Concourse, the Platform and the Staircase was found to be clean with no obstruction at all during his shift. He confirms that during his 2 patrol inspection at 6:00 am and 8:00 am, he could not find any water on the Staircase. DW1 also states that shortly before the accident, a cleaner had passed by and cleaned the Staircase and found no sign of any water. He further states that two of the Station Officers by the name of Eddie Chiu and SW Fok had walked past and inspected the Staircase at around 10:30 am (which was approximately 15 minutes prior to the alleged accident) when they changed duties. Again, they reported that they had not found any water on the Staircase at the time.
3. DW2 was the Station controller of the Station at the 11:00 am shift. He took the MTR from his home in Tsuen Wan to work in the Station as usual on that day. Thus, he would, just like any other passengers, alight the train from the Platform in order to go down to his the control room situated on the Concourse. While walking down the Staircase from the Platform, DW2 saw station officer Eddie Chiu attending the plaintiff at the Staircase. Upon his enquiry, Chiu told him that the plaintiff had allegedly slipped down the stairs due to the wet condition. DW2 then instructed Chiu to return to his duties at the PSB while he assisted the plaintiff.
4. At this point, he found out that the plaintiff could not speak English. However, Hussain who claimed he did not know the plaintiff was present and told DW2 that the plaintiff had stepped on a pool of substance on the Staircase and fell on the floor as a result. The plaintiff expressed pain in his head and foot and therefore an ambulance was summoned.
5. DW2 carried out an inspection of the Staircase and found “a pool of clear substance, appearing like water, around the 2nd flight of stairs”. It was not a big pool of substance. The cleaner was then summoned to clean up the pool of substance and the plaintiff was sent to the hospital.
6. What is interesting is that eventhough both Hussain and the plaintiff claimed that they did not know each other, Hussain volunteered to accompany the plaintiff to the hospital on the ambulance and subsequently acted as his interpreter at the accident and emergency department of the hospital.
7. Enquiries made by DW2 with Chiu and Fok confirmed that they both had not seen any water when they walked past and inspected the Staircase some 15 minutes prior to the accident. DW2 also made enquiry with the cleaner of the cleaning contractor by the name of Li Siu Nog (“Li”). She was able to confirm to him that she had not come across any water when she went past the Staircase only a few minutes before the alleged accident. In fact, enquiries made by DW1 and DW2 with the staff on duties confirmed that none of the staff had found any water on the floor of the Staircase prior to the alleged accident. The area concerned was said to be clean, dry and free of any obstruction.
8. After the plaintiff was sent to the hospital, both DW1 and DW2 found the circumstances of the alleged accident suspicious. They therefore decided to review the CCTV recording of the Platform together. The unusual movements of the plaintiff and Hussain as summed up above could be seen. Having reviewed the CCTV recording, the defendant decided to report this matter to the Duty Service Manager who made a report to the police for their further investigation.
9. To complete the picture, it should be added that the plaintiff returned to the Station a couple of weeks after he was discharged from the hospital with another friend of his by the name of Mohammad. On this occasion, his friend wrote out a handwritten note on the plaintiff’s behalf where he demanded HK$500,000 as compensation by way of “direct settlement within one week” for the “multiple injuries” allegedly sustained by him in the accident.
10. It should also be noted that on the first occasion when the plaintiff went to the Legal Aid Department to apply for legal aid, he passed the phone to the legal aid officer to talk to Hussain, someone he claimed was merely a “passer-by” and not a friend of his.

*Finding on Liability*

1. On a balance of probabilities, I have no doubt that the incident alleged by the plaintiff was not an accident but a deliberate act of Hussain and the plaintiff acting in concert together.
2. There are a number of reasons which has led me to such conclusion. I shall set them out hereinbelow.
3. First, I agree with the submission of Mr Sakhrani, counsel for the defendant, that the plaintiff’s credibility is riddled with difficulties. Not only his account of the events allegedly occurred on the day of the accident are full of inconsistencies – they are different in his pleadings, witness statement and his oral evidence – but the evidence he gave at trial regarding the accident itself is also inherently improbable. The CCTV recording gives rise to very strong suspicion about the circumstances surrounding the alleged accident, yet the plaintiff was not able to provide any satisfactory explanation as to why he appeared in the Platform in the way as he did. While he could have called both Ahmed and Iqbal to give evidence to support his claim that he had arranged with them to attend a mosque for prayers on that day, the plaintiff chose not to do so. He could also have called Hussain, whose phone number he had, to give evidence on his behalf to prove that he was merely a passer-by and not a friend of his, again he had failed to do so.
4. Second, in my view, his alleged travelling to Tsuen Wan in the morning on the day of accident is simply unbelievable. Not only his witness statement contradicted his pleaded case on this and on his oral evidence, the review of the CCTV recording by DW1 and DW2 confirmed that the plaintiff could not be seen alighting from any train from Tsuen Wan from 9:00 am that morning means that he most likely was lying about where he had come from on that day. More important perhaps is the fact that his story about meeting up with Ahmed to attend the mosque in Kwai Chung for prayers simply does not make sense at all. As the plaintiff has confirmed, there was no mosque in Tsuen Wan. Hence, there was no point for him to travel from Shumshuipo (where he lived) to Tsuen Wan only to meet up with Ahmed and to return to Kwai Hing together. They could have simply arranged to meet at the Station. Even more glaring is the fact that while the plaintiff has steadfastly maintained throughout this case that he remembers the events well because it happened on a Friday when he was supposed to meet up with Ahmed and Iqbal for prayers in the mosque together, yet the calendar shows that 12 August 2010 in fact was a Thursday and not a Friday. In my view, this matter alone will be sufficient to severely undermine, if not completely destroy, his credibility as his case is built around the fact that he was in the Station waiting to meet up with Iqbal for Friday prayers that morning.
5. Third, in my judgment, his explanation why he was seen loitering on the Platform by the CCTV recording is totally unconvincing. While he tries to explain his actions by referring to communication with Iqbal on the mobile phone, this was never mentioned in his witness statement. Further, his claim that he has come up to the Platform in order to leave for Shumshuipo is directly contradicted by what has been captured on the CCTV. It can be clearly seen that he had failed to board the train heading towards the Shumshuipo direction which was then boarding at the Platform. When confronted by the defendant’s counsel with this, he changed his story to say that he went to the Platform so that he could sit on the bench in order to wait for the call from Iqbal. However, the CCTV footage shows that he was all along trailing behind Hussain and simply ignored the bench on the Platform without any intention of using it.
6. Fourth, in my view, his claim that he did not know Hussain simply could not be true. As the CCTV footage reveals, the plaintiff was seen emerging from the escalator from the Concourse, with Hussain leading the way and him trailing 3 to 4 steps behind on the Platform. It can be seen that there was a conscious effort by both Hussain and the plaintiff to pretend that they did not know each other. However, their act was betrayed by the fact that while the plaintiff was at the top of the Staircase, Hussain had whispered something to him, which the plaintiff acknowledged by nodding his head, before the latter started to descend. I am quite certain that it was not a greeting between 2 strangers as the plaintiff claims as the plaintiff had never reciprocated. His suggestion that he reciprocated in his heart but not verbally is simply ludicrous.
7. In addition, the fact that Hussain would just happen to be “passing-by” immediately after the plaintiff fell on the steps; then would be willing to act as his interpreter when the ambulance crew arrived; would then willing to accompanying the plaintiff on the ambulance to the hospital; then would introduce himself as a “friend” to the doctors at the A&E department of the hospital (as according to the hospital record); then would visit him while he was in the hospital and talked to the doctors; and eventually was willing to talk to the legal aid officer when the plaintiff applied for legal aid all show that these are too good to be true and too much of a coincident for them to make sense at all.
8. Based on the above, there is no doubt in my mind that the plaintiff and Hussain knew each other and were acting in concert together.
9. Fifth, the evidence suggests that Hussain could not have been a stranger to the plaintiff who happened to be passing by at the time of the accident. His actions as captured by the CCTV footage were very suspicious. Not only he was holding a bottle of water when he first emerged from the escalator, he got rid of the bottle when he re-emerged from the escalator less than 1 minute later after taking a quick gulp of the remaining contents. Further, before descending the Staircase for the first time, he deliberately stopped and leaned over the parapet wall, clearly was checking out the situation within the Staircase. As said, he was also seen whispering something to the plaintiff before descending the Staircase. When he returned to the Platform the second time, he had no interest to board the train at the Station but was seen leaning over the parapet wall and looked into the bottom of the Staircase again, as if expecting something was going to happen or had just happened. He then stopped talking on the phone and started running towards the Staircase. Curiously enough, he was seen taking a quick glance behind him at the PSB before running down the Staircase, clearly was checking whether there was any staff inside the booth. Less than 30 seconds later, Hussain was seen running back up from the Staircase and went straight to the PSB to speak to the staff stationed inside.
10. The above actions of Hussain in my view do not tally with the acts of an innocent passer-by as the plaintiff would like the court to believe. In my judgment, it is clear that Hussain was there to prepare the “scene” for the plaintiff. Otherwise, there was no need for him to look over the wall and check the condition of the Staircase before descending for the first time. Further, Hussain must knew that the plaintiff was about to have a slip-and-fall “accident”, otherwise he did not have to look into the staircase again when he emerged from the escalator the second time and checked if there was someone inside the PSB before running down the Staircase. On a balance of probabilities, I have no difficulty to conclude that it was Hussain who had poured the water from the bottle he was seen holding earlier onto the stairs before asking the plaintiff to descend. That is the reason why he quickly finished off the remaining contents and disposed of the plastic bottle. Further, I have no difficulty to come to the conclusion that Hussain was acting in concert with the plaintiff in creating this whole incident together. This is supported by the fact that they had deliberately kept a distance between them when first emerged from the escalator but only to be betrayed by the fact that Hussain was seen whispering something to the plaintiff before they started to carry out the act together.
11. Last but not the least, on a balance of probabilities, I also find that the accident could not have happened in the way as described by the plaintiff when looking from the perspective of the defendant.
12. First, in my view, the defendant had adopted a proper system of inspection and cleaning. Not only the staff of the defendant would carry out regular patrol to ensure the public area of the Station are clean and free of any obstruction, they also had employed a professional cleaning contractor at the Station who would carry out regular cleaning of the Station, including the Staircase. It is trite that where a defendant has adopted a reasonable system in the cleaning of a public area, it can be regarded as having discharged the common duty of care: see *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd trading as The Excelsior*, unreported, CACV 38 of 2000 (22 November 2000; Mayo V-P, Rogers V-P and Stock JA); *Fazel Ahmed v MTR Corporation Limited*, unreported, DCPI 29 of 2011 (25 April 2012; HH Judge Leung); and *So Yee Ling v MTR Corporation Ltd*, unreported (29 April 2011; HH Judge Leung). In this case, I am of the view that the defendant has discharged its duty.
13. Second, the CCTV recording shows that shortly prior to the alleged accident, no one else, other than Hussain, was seen carrying a bottle of water in their hands, which indicates that most likely that is where the source of water has come from. The fact that the substance found by DW1 was clear and not stained lends weight to this. This goes to support that the chance of accidental spillage within such a short period of time between the last inspection of the station officers and the accident would be very slim. DW2’s evidence is that in the 10 years he worked at the Station, there was only about 5 of such incidents where water spillage was reported or detected. On each occasion, it was immediately cleared up and no injury was reported. Thus, the chance of an accident happened within such a short time would be very remote indeed.
14. Third, the evidence of DW1 confirmed that the cleaning worker Li, stationer officers Chiu and Fok had all walked past the Staircase just a few minutes prior to the alleged accident and none of them could see any water on the stairs. I have no difficulty in accepting the above evidence as carefully related to the court by DW1. In my view, the inference that can be drawn from the evidence given by DW1 must be that the water had only been there for a short time prior to the alleged accident. Given the way Hussain had emerged from the Staircase the second time and quickly got rid of the empty water bottle in his hand, I am of the view that a reasonable inference which can be drawn is that the water must have come from Hussain, there being no other source of water from anybody within the very short time between the last time the staff of the defendant had walked past the Staircase and the occurrence of the alleged accident.
15. In the aforestated circumstances, I have no hesitation in finding that the plaintiff has failed to prove on a balance of probabilities that the accident was caused by the negligence and/or breach of any duty on the part of the defendant. In my judgment, the plaintiff’s fall was not caused by anything but that of a common design by him acting in concert with Hussain together. I therefore would dismiss the plaintiff’s claim herein accordingly.

*Finding on Quantum*

1. For the sake of completeness and just in case I am wrong on my conclusion on the issue of liability, I shall briefly deal with the issue of quantum here.
2. To start with, I agree with the defendant counsel’s submission that the plaintiff’s claim for quantum is without basis and devoid of merits. I further agree with him that the effect of the alleged injury was untenable and exaggerated and the computation of the loss of earnings is without any foundation. The claim has also ignored the fact that the plaintiff is in Hong Kong as an asylum seeker and is not permitted to work lawfully here. Further, his future status is still unclear as he is still waiting for the result of his application for asylum seeking.
3. Subject to the above, in the event that the plaintiff had succeeded in this case, the following are the damages I would have awarded in light of the evidence.

*PSLA*

1. The plaintiff’s main injury consisted of a T12 wedge fracture. In the report of Dr Lee Po Chin, the orthopaedic expert who had examined the plaintiff on the instruction of his then assigned solicitors, it has been concluded that the spondyloysis shown in the X-ray is likely to be pre-existing. There was also no definite spasm of the paraspinal muscles and all the simulation tests were stated as positive. The flip test was also positive. Thus, Dr Lee opined that while it is likely that there is residual back pain, the overall back function of the plaintiff should be reasonable. Further, the objective findings at the examination suggested the injury to his neck and left big toe has recovered without any significant residual symptom. The head injury has also recovered without any residual complaint.
2. Based on the findings at the examination, Dr Lee concluded that the plaintiff may have some residual back pain in his work which requires lifting weight of over 20-25 kg. This may cause some impaired efficiency if he returns to work as a heavy manual worker.
3. I am of the view that the plaintiff has much exaggerated his injury when he says that he experienced pain when lifting more than 7-8 kg. Dr Lee opines that there would only be residual pain if he is required to lift weights of over 20-25 kg. Further, his claim that he has constant pain of severity of 5/10 is plainly something made up by him as this was never mentioned in Dr Lee’s report. Last but not the least, as Dr Lee opines, his back pain which is related to the spondyloysis is likely to be pre-existing and not caused by the accident.
4. In the premises, any damages resulting from the accident for PSLA would in my view be small and would be at no more than HK$120,000: *cf* *Ansar Mohammad v Global Legend Transportation Limited*, unreported, HCPI 1057 of 2007 (9 July 2010; Master Levy) where an award of $150,000 was made for similar but slightly more serious injuries sustained by the plaintiff in that case.

*Loss of pre-trial earnings*

1. A claim for pre-trial loss of earnings has been made on the basis that he was earning about HK$2,500 per month (ie 30,000 rupees) as a supervisor in a textile factory doing heavy manual work and as a farmer prior to his coming to Hong Kong. And if he were to return to Pakistan today, he could only earn only HK$1,000 doing light job as a security guard as he could no longer do any heavy manual work in a factory or as a farmer.
2. I am of the view that such claim is made absolutely without any basis. First, the plaintiff is detained under section 32 of the Immigration Ordinance, Cap 115 and is only released by virtue of section 36(1) by entering into a recognizance as required by the Immigration Department. Thus, he could not have been legally engaged under any form of remunerative employment in Hong Kong since his arrival here in 2008. Second, there is not a shred of evidence other than what he says to show what he was actually earning while he was in Pakistan or what he is likely to earn if he returns to his country. Third, the opinion of his own expert does not support his claim that he was not able to return to moderate to heavy manual work as a result of the accident.
3. In the circumstances, I have no hesitation to dismiss his claim for loss of accrued earnings.

*Future loss of earnings*

1. There is no evidence to suggest when his application process for asylum seeking will complete and what is the likely outcome. Until then, he will still not be able to work lawfully in Hong Kong and not able to earn any income. Further, as said, there is no evidence produced by the plaintiff to show what he was earning before he came to Hong Kong and what he is likely to earn one day when he returns in light of his alleged disabilities. More importantly, his claim for future loss of earnings is simply not supported by any medical opinion, including the opinion of his own orthopaedic expert. Thus, no award for future loss of earnings will be made.

*Loss of earning capacity*

1. In my view, there is simply no basis for the plaintiff to make a claim for loss of earning capacity in this case.

*Special damages*

1. This has been agreed at $1,300 by the defendant’s counsel at the trial.

*Summary of damages*

1. In summary, the total sum of damages which I would otherwise award if liability can be established in this case will be at HK$121,300.

*CONCLUSION*

1. In my view, there exists sufficient evidence which may suggest some criminal elements in the case. However, I am aware that it is not open for me to find a case of fraud or some other criminal acts in the case since this was not pleaded and it has been said that the serious allegation of forgery must be proved by evidence of a commensurate cogency: see *Ming Shiu Chung & Others v Ming Shiu Shum & Others* (2006) 9 HKCFAR 334, per Ribeiro PJ. Therefore, I shall not make such a finding in this case. It is not necessary for me to do so.
2. I had considered referring this case to the police for their investigation as I agree with the defendant’s counsel that there is a strong public interest element here. However, upon mature consideration, given the fact that the matter had already been referred to the police by the defendant soon after it happened (and it seems that no action was taken by them at the time), I do not consider it would be appropriate for me to do that again. However, I see no reason why this matter should not be referred to the Department of Justice for their consideration and to see if any further action should be taken. I shall do so accordingly.
3. I would also like to add this. Asylum seekers are welcome to come to Hong Kong to seek asylum here as we are obliged under the international treaties to afford protection to them. But they must not abuse their rights by making bogus and unwarranted claims as the plaintiff did in this case. It is wrong for them to make use of public money and resources as the plaintiff did by making use of the legal aid fund (until his legal aid certificate was discharged after the CCTV recording was disclosed) to lodge such claims. The court will not tolerate and allow this to happen.
4. Thus, based on the aforesaid, the plaintiff’s claim is herein dismissed with costs to the defendant with certificate for counsel, eventhough I am fully aware that the possibility of the defendant in recovering any costs from the plaintiff is extremely remote.
5. Lastly, I would like to thank Mr Sakhrani for his helpful assistance.

( Andrew SY Li )

District Judge

The plaintiff was not represented and was acting in person

Ashok Sakhrani, instructed by Deacons, for the defendant