## DCPI 1493/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSON INJURIES ACTION NO. 1493 OF 2006

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##### BETWEEN

LAU KWOK TAI Plaintiff

### and

HANG YICK PROPERTIES Defendant

MANAGEMENT LTD.

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Coram : Deputy District Judge A. Yuen in Court

Date of Hearing : 9th July 2007 – 11th July 2007

Date of handing down Judgment : 30th July 2007

JUDGMENT

1. This is an action brought by the Plaintiff against the Defendant for damages in respect of personal injuries sustained by him when he was tripped and fell by a manhole cover which allegedly was not placed properly and its edge was protruded above the ground level.
2. The Plaintiff claims that the Defendant was negligent at common law and also committed a breach of duty under the Occupier’s Liability Ordinance (OLO).

The Accident

1. The Plaintiff’s case is that at the material time of the incident, he worked as a deposit services officer of Hang Seng Bank at the Shatin Prestige Banking Centre, situated at No. 9 G/F, Shatin Centre Street, Shatin Plaza. (The Centre)
2. At about 8:00 a.m. on 23.9.03, when he was walking along the pavement leading to the Centre, he was tripped by a raised manhole cover. As a result, he fell and injured his right elbow and left knee.
3. After the fall, he found that one edge of the manhole cover protruded above the ground level by approximately 1.5 inches. He was finally able to limp back to the Centre and subsequently, accompanied by a colleague, he went to the A & E Department of PWH by taxi.
4. X-ray revealed that he had a fractured left patella and he was admitted to the Department of Orthopaedics and Traumatology for further treatment. Further examination revealed that he had fracture over his right radial neck near the elbow. On the following day, he was given an operation of open reduction and internal fixation for the fractured patella. As regards the fractured right forearm, it was treated with plaster and bracing. The Plaintiff was hospitalized for six days and was discharged on 29.9.03. After discharge, he continued to attend follow-up treatment until 7.1.05.
5. The Plaintiff was granted sick leave for a total of 168 days from 23.9.03 to 8.3.04. After the expiry of sick leave, he resumed working in the Centre until he quitted in June 05.
6. The Plaintiff adduced two witnesses.
7. Mr. Chiu Kit Ling was the Shatin branch manager of Hang Seng Bank. He signed on an Industrial Accident Report (the Report) prepared by the Hang Seng Bank on 25.9.03. According to the Report, it said that the Plaintiff stepped onto the protruded part of the manhole cover, lost balance and fell.
8. Mr. Chiu testified that he was not the one who provided the information nor was he the one who filled in the Report. It was submitted to him for signature and he signed on it because he was in charge of the Centre.
9. The second witness was Ms. Chan Yuk Wah who was the manager of the Centre at the time of this accident. The Plaintiff was her subordinate. Ms. Chan testified that on the morning in question, the Plaintiff reported to her the accident. She then went out to have a look at the manhole cover and found that it was raised a bit.

The Defence Case

1. Defendant adduced three witnesses.
2. Mr. Chan Kwai Wai was the Chief Security Officer of Uniformity Security Co. Ltd. His company was contracted to provide security and patrol services at Shatin Plaza, including the exterior common area of Shatin Estate. Each security guard had to follow a designated route around the exterior of each block within Shatin Estate. The manhole cover in question was along the said route. The patrol was conducted by a single guard and at a regular interval. Each guard had to report to Mr. Chan after each patrol, no matter whether or not there was any unusual occurrence. The report was then recorded by Mr. Chan in an Occurrence Book.
3. Mr. Chan had reviewed the said Occurrence Book and found no record of any complain of any trip and fall accident on 23.9.03, nor was there any record about any protruded manhole cover being observed by any guard, nor any record of any work being undertaken by anyone at the manhole in question during that period of time.
4. Mr. Chan further testified that the manhole in question bore the name “PCCW”, therefore he believed that it belonged to PCCW-HKT Ltd.
5. Mr. Lee Tai Lung and Mr. Ho Wing Yee were two other security guards who were on duty on 23.9.03. Both testified that they had never noticed any raised manhole cover during their patrols and they never received any complain or report regarding any raised manhole cover during their duty.
6. Defendant also produced a letter from PCCW confirming that there was no record of any work being undertaken at the manhole in question during the material period of time.

Cause of Accident

1. There is a dispute as to whether or not Plaintiff sustained his injuries as a result of being tripped by a raised manhole cover.
2. The only evidence in this regard came from the Plaintiff himself. There was no independent witness. However, there were circumstantial evidence that support his evidence.
   * + 1. The Injuries

Plaintiff suffered a fractured left knee and right forearm near the elbow. This is consistent with injuries sustained when one was tripped and fell forward instead of slipped and fell backward.

* + - 1. The Industrial Accident Report prepared by Hang Seng Bank

Although it’s unclear as to who filled in this report, evidence suggested that it was Ms. Chan Yuk Wah who provided the information to the author of the report. According to Ms. Chan’s evidence, she received the complain from Plaintiff who told her that he stepped onto the protruded part of a manhole cover, lost balance and fell. It’s how she related the accident to the author of the report.

This report cannot be regarded as independent evidence of the accident, yet, shows the consistency of Plaintiff’s complain.

* + - 1. The Inspection of the scene by Hang Seng Bank

According to Mr. Chiu Kit Ling, a few days after accident, he accompanied people from bank’s Headquarters to inspect and take photos of the manhole in question after receiving the complain. Again, this shows the consistency of Plaintiff’s complain.

1. Putting all these together, I’m satisfied on balance of probability that the Plaintiff was tripped and fell by a raised manhole cover at the material time of the accident.

Liability

1. There is no dispute that the Defendant was the management company responsible for managing the common area of Shatin Plaza including the pavement where the manhole in question was located. The Defendant was an “occupier” of the area within the meaning of OLO. There is also no dispute that the Plaintiff was a lawful “visitor”. The question is whether or not there is a breach of the common duty of care under the OLO and whether or not the Defendant was negligent.
2. S.3(1) of OLO provides that:

“An occupier of premises owes the same duty, the ‘common duty of care’, to all his visitors…….”

S.3(2) provides that:

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

1. There is no doubt that the Defendant, being the “occupier”, owes a common duty of care to the Plaintiff. It had a duty to “take such care as in all the circumstances is reasonable” to see that the pavement was “reasonably safe” for people like Plaintiff who came lawfully to use it.

Had the Defendant breached this duty in this case?

1. One should note that the standard of care is a “reasonable” one vis-à-vis an absolute or strict liability on the Defendant having regarded to all circumstances of the case.
2. From the photos taken by the Plaintiff a few days after the accident, one can see that the pavement in question was in good condition. Therefore, one can infer that the condition of the pavement was more or less the same on the day of accidence save and except the alleged raised manhole cover.
3. According to the Plaintiff’s testimony, the edge of the manhole cover which was raised was close to a shop which was adjacent to the pavement and was under renovation. Plaintiff estimated that the raised edge was about 1.5 inches above ground level.
4. Evidence suggested that this pavement was a busy thoroughfare, yet there was never any complain or report of any raised manhole cover tripping any pedestrian. Nor was there any evidence that any of the guards who conducted their routine patrol had noticed such a raised manhole cover.
5. Accepting Plaintiff’s evidence that the manhole cover was indeed raised, it’s clear that it’s not obvious to any reasonable man. Nor was there any evidence that it’s a common occurrence. Therefore, there is no evidence suggesting that the Defendant was or ought to have aware of the raised manhole cover before the accident.
6. This manhole cover clearly did not belong to the Defendant. Evidence suggested that it belongs to PCCW. Assuming there was indeed work done at this manhole the day before the accident, there is nothing wrong for the Defendant to rely on PCCW to replace the manhole cover properly and no reason for the Defendant to doubt the competence of PCCW.
7. The question therefore is : Ought the Defendant reasonably to have foreseen that Plaintiff would be tripped by a raised manhole cover when using this pavement?
8. The pavement was in good condition, there was never any history of pedestrian being tripped by a raised manhole cover. The alleged raised manhole cover was unnoticeable to any reasonable man. In any event, it did not belong to the Defendant and if any work done on it, it was done by a competent independent contractor other than the Defendant.
9. After considering all the circumstances of this case, I fail to see how the Defendant could be reasonably expected to have foreseen the risk, if any, in this case. Therefore, I see no breach of duty by the Defendant under OLO, nor do I find the Defendant negligent in failing to notice the raised manhole cover.

Quantum

1. In the event that I was wrong in holding that the Defendant was not liable, I will go on to consider the quantum of recoverable damages.
2. Just to recap: As a result of the accident on 23 September 2003, Plaintiff suffered a fractured left patella and right radial neck near the elbow. The knee injury was treated by open reduction and internal fixation. The forearm injury was treated with plaster and bracing. Plaintiff was hospitalized for six days and attended follow-up treatment until 7 January 2005.
3. From 9 October 2003 to 19 December 2003, Plaintiff received a total of 21 sessions of physiotherapy treatment.
4. From 22 December 2003 to 6 March 2004, Plaintiff received a total of 24 sessions of occupational therapy.
5. Plaintiff was granted sick leave of five odd months (from 23 September 2003 to 8 March 2004). At the expiry of the sick leave, Plaintiff resumed his pre-accident duty in the Centre. Plaintiff quitted his job in January 2005.
6. Plaintiff, who is now 54, complains of pain, stiffness and numbness over his right elbow and left leg. That he feels discomfort after prolonged standing or sitting. That he has difficulty walking fast or run and has to hold handrail for walking on staircases. He also has difficulty squatting and bending his left knee.
7. The injury also has a great impact of his daily living and enjoyment of life.
8. The Medical Assessment Board assessed that he had a permanent loss of earning capacity of 2% which was revised to 3% upon review.
9. Plaintiff’s doctor, Dr. Fu Wai Kee, opined that Plaintiff had suffered from traumatic arthritics of the patello-femoral joint because of the accident. As a result, Plaintiff’s left leg would deteriorate in the coming years and causing more pain. Dr. Fu recommended Plaintiff to have intra-articular hyaluronic and injection of left knee every two or three years to prevent it from aggravating. Furthermore, X-ray examination revealed broken wire loop inside his left knee. Dr. Fu suggested Plaintiff to remove the said wire as soon as possible so as to avoid it migrating to other places. Plaintiff is considering these recommendations.

PSLA

1. After considering all the circumstances of this case, I agreed with the Plaintiff that a sum of HK$300,000 should be awarded under this head.

Pre-trial Loss of Earnings

1. There is no dispute that Plaintiff did resume his pre-accident work for 15 months until he quitted on his own in June 2005 and he had been receiving the same income as before the accident. Plaintiff was a deposit service officer of a bank. His major duty was to handle paperwork. Plaintiff testified that since he was the only male staff in the Centre, he was required to take care of some of the heavy duties such as conveying promotion leaflets and forms. Furthermore, his duty required prolonged standing which caused him discomfort and pain to his injured leg. As a result, he was “forced” to quit on his own in June 2005.
2. It is clear in this case that Plaintiff did not quit because of pressure from his employer. There is no suggestion whatsoever that Plaintiff’s employer had at any time expressed dissatisfaction with Plaintiff’s performance after he resumed duty.
3. I accept Plaintiff’s evidence that his post in the Centre required him to take care of some heavy duties work and the prolonged standing would cause him discomfort and pain. However, I do not understand why Plaintiff did not request his employer to relocate him to some other post or office where little or no heavy duty work was involved or prolonged standing not required. Had Plaintiff made such a request and rejected by his employer, I could appreciate the pressure he experienced and the reason why he decided to quit.
4. Counsel for Defendant had rightly pointed out that in fact after he quitted, he had applied for jobs of a similar nature or even work of greater physical demand. Bearing in mind the reason why Plaintiff quitted his job in Hang Seng Bank, I found it strange.
5. I found that there was indeed no good reason for the Plaintiff to quit his job without first seeing if his employer could relocate him to another post or office which might accommodate his after-accident condition. The fact that he could not secure another job after he quitted had nothing to do with his injuries because he never informed the potential employers anything about his physical handicap.
6. I found the Plaintiff not entitled to an award under this head.

Loss of Earning Capacity

1. Had the Plaintiff not quitted his job, he might still be working in Hang Seng Bank, earning the same income as before accident. I found the Plaintiff not entitled to any award under this head.

Future medical expenses

1. I found Dr. Fu’s recommendation and suggestion of costs of treatment reasonable. I agreed with Plaintiff’s claim of a sum of HK$31,500 (i.e. HK$10,500 x 3 injection courses).
2. There is no dispute that Plaintiff needs to remove the broken wire loop in his knee as soon as possible. I agreed the cost should be around HK$25,000.
3. I also agreed with Plaintiff that after the removal of the broken wire loop, he needs a rest of one to two months. I will allow a sum of HK$35,659.25 (i.e. HK$23,772.83 x 1.5 months), being the loss of earning during the rest.

Special Damages

1. There is no evidence as to what tonic food was purchased and consumed. I will allow a sum of HK$5,000. Therefore the total sum of special damages awarded is HK$6,020 (i.e. traveling expenses H$1,020 + tonic food expenses HK$5,000).

Summary of Loss and Damages

1. (i) PSLA HK$300,000.00

(ii) Pre-trial Loss of Earnings Nil

(iii) Loss of Earning Capacity Nil

(iv) Future Medical Expenses 92,159.25

(v) Special Damages 6,020.00

398,179.25

Less: EC Compensation received 45,360.00

Total: $352,819.25

Interest

1. Interest on PSLA: 2% p.a. from the date of writ of summons to date of trial.
2. Interest on Special Damages: Half of judgment rate from date of accident to date of trial.

Conclusion

1. The Defendant was not in breach of duty under OLO nor was it negligent. There will be an order nisi that costs be to the Defendant, to be taxed if not agreed.

(Anthony Yuen)

Deputy District Judge

Representation:

Mr. LING Chun-wai instructed by Messrs. Rita Law & Co. for the Plaintiff.

Miss Phillis L.P. LOH instructed by Messrs. Cheng, Yeung & Co. for the Defendant.