## DCPI 2165/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2165 OF 2007

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| --- | --- | --- |
| BETWEEN | LAM KIT HONG | Plaintiff |
|  | and |  |
|  | PARAMATTA ESTATE MANAGEMENT LIMITED | Defendant |
|  | and |  |
|  | UNIVERSAL CLEANING SERVICES LIMITED | 1st Third Party (Discontinued) |
|  | GENERAL SECURITY  (HONG KONG) LIMITED | 2nd Third Party (Discontinued) |

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 2, 3, 6 and 7 July, 2009

Date of handing down Judgment : 23 July, 2009

# JUDGMENT

**Background**

1. Mr. Lam was at Ngan Shing Commercial Centre ("**Center**"), City One, in Shatin on 22 May 2006. It was raining heavily at the material time. Between 5:30 p.m. and 6 p.m., Mr. Lam was about to leave the Center, when he slipped on the floor near the main entrance to the shopping arcade ("**Arcade**") of the Center, and fell. As a result of the accident, he fractured his right upper arm.
2. These proceedings are instituted by Mr. Lam against Paramatta Estate Management Ltd. ("**Managers**"), which is the company responsible for the management of the Center. It is claimed that the Managers are the occupiers having control of the Center, and owes a duty of care to ensure that Mr. Lam, as a visitor to the Center, would be reasonably safe in the Center. Mr. Lam claims that he had slipped as a result of the floor near the exit of the Arcade being wet, and alleges that his injury was caused by the negligence and/or breach of the common duty of care under the Occupiers' Liability Ordinance on the part of the Managers, their servants or agents in failing to take adequate measures to ensure that the floor was not slippery or wet, and in failing to give warning to visitors of the slippery and/or wet floor.

**Legal principles**

1. The parties are not in serious dispute as to the applicable legal principles. Counsel for Mr. Lam accepts that the Managers' duty of care to visitors is not an absolute duty. References have been made to the leading cases of *Ward v. Tesco Stores Ltd.* [1976] 1 WLR 810, and *Cheung Wai Mei v. The Excelsior Hotel (Hong Kong) Ltd.* CACV 38/2000, 22 November 2000. The law is succinctly summarized in the Judgment of Megaw LJ in *Ward v. Tesco Stores Ltd.* at page 815, which passage was quoted by Mayo VP in *Cheung Wai Mei*'s case :

"It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault … When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection for customers."

1. The Managers do not dispute that they owed a duty of care to Mr. Lam. However, they deny that they were negligent, and claim that they, their servants and agents had taken all reasonable steps to take reasonable care. The Managers claim that they had appointed an independent and competent cleaning contractor to clean the Center, and that an effective system had been put in place to keep the floor of the Center and the Arcade in a clean and dry condition, and to prevent the floor from being slippery. This system includes specific measures to be taken on rainy days.

**Issues**

1. The issues in dispute for determination at trial are:
   1. Did Mr. Lam sustain injury in the manner he described?
   2. Had the Managers, their servants or agents discharged their duty of care by maintaining an adequate system to keep the floor of the Center reasonably dry and safe on rainy days?
   3. What are the damages recoverable by Mr. Lam?

**Did Mr. Lam sustain injury in the manner he described?**

1. According to Mr. Lam, he was approaching the glass door at the Pak Tak Street main entrance of the Center, and was approximately 2 m away from the glass door, when he slipped on the marble floor. Mr. Lam's evidence is that when he entered the Arcade of the Center shortly before the accident, he had been taking precautions as he knew that it was raining outside, and that the floor in the arcade might be wet. He had stayed in the Arcade for only 5 to 10 minutes and was on his way to the exit, when the accident happened. Mr. Lam claims that he was walking slowly or at a normal pace at the material time, but had not noticed whether there were warning signs of the wet floor near the glass doors at the exit.
2. According to Mr. Lam, just before his fall, he had felt his right foot step on something slippery, which caused him to lose his balance and to fall backwards. He used his right hand to support himself as he fell, and as his hand hit the floor surface, he felt that the floor surface was wet. He had not noticed that there was water on the floor before he slipped.
3. According to Mr. Lam's evidence, he was not able to get up from the floor because of the pain and the dizziness from the fall. A security guard at the arcade came to Mr. Lam's assistance shortly afterwards, and on Mr. Lam's evidence, the security guard told Mr. Lam not to move, and that an ambulance had already been called because someone else (other than Mr. Lam) had also just slipped and fallen. Mr. Lam himself also saw a girl sitting not far from him. The evidence produced at trial includes a separate incident report prepared by the security guards at the Center in respect of a female visitor, Miss Lau, having slipped at the Arcade in the Center at around 5:52pm on the same day, 22 May 2006. The Managers likewise had on 29 May 2009 prepared a report of Miss Lau’s accident. It is not disputed that another ambulance was called for Mr. Lam, and both Mr. Lam and Miss Lau were taken to the hospital for treatment.
4. I accept Mr. Lam's evidence and find, on a balance of probabilities, that he had slipped on the marble floor near the glass doors because of the presence of water on the floor.

**Had the Managers, their servants or agents discharged their duty of care by maintaining an adequate system to keep the floor of the Center reasonably dry and safe on rainy days?**

1. It is the Managers' case that they do not have an absolute duty to ensure visitors' safety. They claim that they had a more than reasonable and adequate system in place to ensure that the floor at the main entrances in the Center is maintained clean and dry, even on rainy days.
2. According to the evidence of Mr. Shum, who is employed by the Managers as property manager, the Managers contracted with Universal Cleaning Services Ltd. (" **Universal**") to provide cleaning services for the Center. Under their Contract, Universal has to provide workers to clean the entrances and exits of the Center 3 times a day, between 7 a.m. to 10:30 p.m.. 4 workers are required to carry out cleaning services in 2 teams, one team working between 7:30 a.m. to 5:30 p.m., and one team working between 7 a.m. to 5 p.m.. In addition, cleaning services have to be provided by one male worker between 5 p.m. to 10:30 p.m., one female worker between 8 a.m. to 5 p.m., and 2 female workers working between 5 p.m. to 10:30 p.m. and 5:30 p.m. to 10:30 p.m. respectively. In addition to the provision of cleaning workers, a foreman works between 8 a.m. to 6 p.m. to supervise the work of the cleaners, and a part-time cleaner works between 10:30 p.m. to 3 a.m..
3. Mr. Shum's evidence is that on rainy days, additional workers would be assigned to increase the frequency of the cleaning of the entrances to the Center.
4. The Managers have also contracted with General Security (Hong Kong) Ltd. ("**General**") to provide security guards to patrol the Center. The security guards would inform the cleaning workers if rubbish or water have to be cleaned or removed. On rainy days, the security guards would place warning signs at the entrances to the Center, to warn visitors of the wet or slippery floor. Plastic bags would also be placed on the stands, for visitors' use to carry wet umbrellas.
5. Mr. Shum claims that as the manager, he would patrol the Center periodically to supervise the work of the security guards and the cleaning workers. Mr. Shum claims that his 2 colleagues working at the management office would do the same.
6. It is Mr. Shum's evidence that on the day of the accident, it was raining heavily, and Mr. Shum recalls having patrolled the Center some time in the afternoon to ensure that the security guards had placed warning signs and umbrella bags at the entrances to the Center. Mr. Shum's evidence is that at the entrance where Mr. Lam had slipped, a metal stand with umbrella bags and a sign warning of the slippery floor, as well as a yellow plastic stand warning of the slippery floor, had been placed near the glass doors.
7. Mr. Pei is employed by Universal as project supervisor, mainly in charge of the cleaning project of the Center. It is Mr. Pei's evidence that the floor in the Center is cleaned 3 times a day, namely, in the morning, at noon and in the afternoon. The floor would be cleaned with disinfectant before 10 a.m. and in the afternoon, and would be mopped dry. A yellow stand warning visitors of the slippery floor would be placed on the floor until the floor was fully dry. Mr. Pei claims that he would inspect the Center three times a day. If rubbish or water is found on the floor, he would immediately ask the workers to clean it, and they would do so immediately.
8. On rainy days, additional workers would be stationed at the entrances to the Center. Mr. Pei explains that on rainy days, the workers normally working in the open areas at the residential blocks would not have to work in the open, and can thus be assigned to the Center to help with the work required there. The standard and fixed procedure is that 3 workers would be stationed in the Center, one at each of the main entrances. The floor would be cleaned every 30 minutes at the entrance to ensure that the surface is dry. Mr. Pei's evidence is that it would take 30 minutes to clean the area in the vicinity of the glass doors at the main entrances. According to Mr. Pei, the workers would use water suction machines and water scrapers to clear away water at the entrances. If the cleaning workers notice any water on the floor, they would immediately mop it dry. There would be yellow plastic warning signs put at every entrance to warn visitors of the slippery floor. According to Mr. Pei, anti-slip mats would also be placed at the entrances on rainy days.
9. Mr. Pei's evidence is that the procedure had been in place for many years, and it was unnecessary to give further specific instructions to any of the workers as to what to do on a rainy day. According to Mr. Pei, he would be patrolling the area at least 3 times a day, up to more than 10 times, to ensure that the work was done. If necessary, he would also help to mop the floor.
10. Although both Mr. Shum and Mr. Pei gave evidence as to the cleaning procedures Universal were *contractually* obliged to carry out and which were devised as standard procedure to be put in place, I have to be satisfied that such procedures *were* in fact put in place and *were* operative on the day in question. In this latter regard, the evidence is not entirely clear.
11. Mr. Shum's evidence is that he had inspected the Center during the afternoon of 22 May 2006 and that the signs and the umbrella bags were at the entrance near the glass doors and where Mr. Lam had slipped. However, the hours of operation of the management office where Mr. Shum worked are from 9 a.m. to 5:30 p.m.. According to the incident report prepared by General, Mr. Lam’s accident took place at about 5:52 p.m.. Mr. Shum was not able to give any further direct evidence as to the events of the evening.
12. Mr. Pei produced in evidence Universal's attendance record to show that on 22 May 2006, 3 workers were on duty from 5 p.m. to 10:30 p.m.. These include one foreman and 2 female cleaning workers, Ngai and Lee. Although the attendance record states that the position to which each worker is assigned to work should be stated, this was not in fact done and it cannot be seen from the attendance record where each worker was assigned to work.
13. It is Mr. Pei's evidence that as the supervisor of the cleaning workers at the Center, he expected to be informed if and when an accident took place in the Center involving a visitor to the Center being injured as a result of a slip and fall. His evidence is that upon being so informed, he would immediately have the floor cleaned, and immediately tell the cleaning workers about the incident at a meeting, so that proper attention could be paid to the condition of the floor of the Center and dangerous incidents would not happen again. On Mr. Pei's evidence, however, he had never been informed of the incident of Mr. Lam's fall.
14. Ngai gave evidence, but she had no recollection of where she was assigned to work in the evening of 22 May 2006. She confirmed that the cleaning workers were required to clean and mop the floor of the Center 3 to 4 times a day. On rainy days, the frequency of cleaning and mopping the floor would be increased. Wherever there was water, it would have to be mopped dry. Ngai's evidence is that on rainy days, the cleaning workers would be stationed at the 3 main entrances to the Center. Although she had no recollection of the events of the evening of 22 May 2006, Ngai confirmed that she had had experience of being stationed to work at the main entrance on a rainy day. Her instructions were to dry the floor once every 30 minutes. Ngai said that she would dry the floor wherever there was water, including going all around the Center. When questioned, Ngai confirmed that this was part of the daily routine of work, as well as the work which she was required to do when she was stationed at the main entrance of the Center on rainy days. She further explained that on rainy days, she would have to work everywhere, including the main entrance, the vicinity of the main entrance, and wherever it was wet in the Arcade.
15. The incident reports compiled by General in the evening of the accident and by the Managers on 29 May 2006 only record that Mr. Lam's accident took place at about 5:52 p.m., when a security guard was alerted and went to the scene of the accident. The guard arrived at the scene of Mr. Lam’s accident at 5:55 p.m.[[1]](#footnote-1). The reports record that it was raining heavily outside when the accident occurred, and that warning signs had been placed at the location. Under "Action Taken" in the Managers' report, it was recorded that the "cleaning contractor helped to clear the water".
16. I accept the submissions made by Counsel for Mr. Lam that from the evidence available, the reasonable inference is that no cleaning worker was in fact stationed at the entrance to the Center where Mr. Lai had fallen. If a worker was stationed there, it is reasonable to expect this to have been recorded in the records of either the Managers, or Universal, or the incident reports prepared by General. When the Managers reviewed General's incident reports and prepared their own report, they should have been able to identify from any available records the cleaning workers stationed at the location, if there were any. Only Ngai was called to give evidence for the Managers, and she knew nothing of Mr. Lau's accident. From Mr. Lam's evidence that when he was sitting on the floor after the accident, he could see the other visitor who had fallen and who was waiting for the ambulance, I infer that Miss Lau's fall had taken place in the vicinity of the location where Mr. Lam had slipped. Despite the fact that events had taken place more than 3 years ago, 2 persons slipping and falling within minutes and necessitating 2 ambulances to be called should be an extraordinary event, more likely than not to be remembered by a cleaner drying the floor at the relevant time of the occurrence of such events. If Mr. Shum had made inquiries and investigations after the accident with the cleaning workers on duty on 22 May 2006, he should not have experienced difficulties in identifying the worker stationed there at the entrance at the relevant time.
17. I find therefore that at the time of Mr. Lam's accident, there was no cleaning worker stationed at the main entrance from Pak Tak Street. I accept Mr. Lam's evidence that it was only after his fall that cleaning workers were called in to dry the floor near the glass doors at the main entrance, and that he had not seen any cleaning workers in the vicinity before he slipped.
18. As to whether there is negligence on the part of the Managers, I agree with the remark made by Hon Rogers VP in his judgment in *Cheung Wai Mei v. The Excelsior Hotel (Hong Kong) Ltd*. that a plaintiff is putting "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". However, I consider that the facts of this case are distinguishable from those in *Cheung Wai Mei*.
19. In *Cheung Wai Mei*, there was no evidence of any one seeing any water, moisture or any slippery substance at or near the scene of the accident. There was no evidence of rain, and the plaintiff was walking very quickly. In these circumstances, the Court of Appeal took the view that it was sufficient to have at least one cleaner on duty in the hotel that night, and that there was no evidence of any negligence on the part of the defendant. At the end of the day, it is for the Court to take into account all the circumstances of any particular case in deciding whether there is negligence, or whether there is an adequate system of inspection or cleaning, as is appropriate to the facts of the case.
20. On the evidence in this case, there is no dispute that it had been raining before and at the time of the accident. On the Managers' evidence, it was raining heavily. It should have been reasonably foreseeable by the Managers that there would be water transported by people coming into the Center from outside, that the marble floor in the vicinity of the glass doors at the entrances to the Center would be wet and slippery, and that visitors to the Arcade and the Center would be at risk of slipping and falling by virtue of the wet and slippery marble floor. In these circumstances, I consider that the Managers who clearly have occupational control of the Center have the duty to take reasonable steps to keep the marble floor in the vicinity of the entrances to the Arcade and the Center dry and safe for visitors. The courts will not require the Managers to remove any signs of water wherever and whenever they are present in the Arcade or the Center, nor to station people at all corners of the Arcade and the Center at all times. However, I consider that the Managers do have to take reasonable measures to ensure that the areas of the Center most susceptible to being wet and slippery for visitors on a rainy day, such as the main entrances from which visitors come into the Arcade of the Center from the rain, and hence likely to bring in rain water, are kept reasonably dry and safe. In my Judgment, this necessarily involves having workers being stationed at these main entrances, to keep the floor reasonably dry, and otherwise to give adequate warning to visitors of the wet floor.
21. It is not disputed that there were 3 large entrances to the Center, which are referred to in the evidence as the main entrances. In addition, there are 4 other smaller exits. In my Judgment, it is reasonable to expect anti-slip mats, prominent warning signs and umbrella bags to be put in place at all the entrances, including the smaller ones. In addition, it is in my Judgment reasonable and appropriate for the large main entrances (where the traffic of people can be expected to be heaviest) to be manned by workers on rainy days, so that these workers can take adequate steps to keep the floor in the vicinity of the main entrances reasonably dry and safe for visitors, and to verbally alert visitors, if necessary, of the wet floor if it is not dried in time.
22. On the evidence, there were only 3 cleaning workers on duty after 5 p.m. at the Center, and this includes the foreman.
23. According to Ngai, cleaning workers assigned to work at the 3 main entrances were not only required to clean and dry the area around the main entrances, but were also required to dry and clean the floor all around the Center. Notwithstanding Mr. Pei's evidence that additional workers would be allocated to assist the cleaning workers in the Center during rainy days, the attendance record only shows that Ngai and 2 other workers were on duty from 5 p.m. on 22 May 2006. No evidence has been adduced to show any additional workers actually allocated to work after 5 p.m. to assist the cleaning of the Center on that rainy evening. Mr. Shum's claim that the increase in the frequency of the cleaning of the entrances to the Center on rainy days is a bare allegation not supported by the evidence.
24. From Ngai's evidence, it is clear to me that if there were only 3 cleaning workers on duty, there would be insufficient manpower to ensure that the marble floor in the vicinity of the main entrances is kept reasonably dry and safe. On the one hand, Mr. Pei claims that it would take 30 minutes to clean the vicinity of the glass doors at the main entrances, and that the cleaning at this area takes place every 30 minutes. On the other hand, Ngai claims that she would be required not only to clean the area at the main entrance where she was posted, but also to clean all areas in the Center whenever there was water. The cleaning worker will not be able to remain stationed at the area of the main entrance to focus on the drying of the floor and giving adequate warning to visitors there.
25. The lack of adequate manpower is, in my Judgment, supported by the evidence of Mr. Lam suffering a slip and fall shortly after Miss Lau had occasioned a fall in the vicinity. If a cleaning worker had been stationed at the main entrance, and be available to dry the floor immediately after Miss Lau's fall, Mr. Lam's fall might have been avoided, or he could otherwise have been adequately warned of the slippery floor.
26. The fact that Mr. Pei, the supervisor of the cleaning workers, never had notice of Mr. Lam's accident is further evidence that there are obvious defects and break down in the system devised by the Managers and Universal.
27. Bearing in mind the location where the accident took place and the time of its occurrence, I consider that the Managers had failed to ensure that there were adequate cleaning workers at the main entrances to keep these entrances reasonably dry and safe for visitors on a rainy day.
28. I am not satisfied, on a balance of probabilities, that the Managers had discharged their duty of care by maintaining an adequate system to keep the floor of the Center reasonably dry and safe on rainy days. The placing of anti-slip mats and warning signs at the entrances are not sufficient to give adequate warning to visitors of the potential dangers of the wet and slippery marble floor.
29. On the evidence available in this case, I conclude that the Managers, their servants and agents had failed to take all reasonable precautions to guard against visitors to the Center slipping and falling as a result of the presence of water at the main entrance to the Center where Mr. Lam had slipped.
30. I do not accept that Mr. Lam was negligent, or had contributed to his injury in any way. He was walking at a normal pace, and unfortunately, water on the surface of patterned marble floor is not easily or reasonably detectable.

**What are the damages recoverable by Mr. Lam?**

***Pain and suffering and loss of amenities***

1. Mr. Lam was 34 years old at the time of the accident. He worked as an investment consultant, earning an average income of $32,810.25 prior to the accident.
2. As a result of the fall, the shaft of Mr. Lam's right humerus was fractured and his right arm was deformed. He was admitted to the Accident and Emergency Department of Prince of Wales Hospital, where he was treated by plaster and analgesics, and was hospitalized for 3 days.
3. Mr. Lam was given sick leave from 22 May 2006 to 28 July 2006, for a total of 68 days. He had an operation for open reduction and internal fixation for his right humerus fracture on 20 June 2006. He had physiotherapy from July 2006 to January 2007. He resumed his work as an investment consultant upon the expiry of his sick leave.
4. Mr. Lam claims that he currently suffers from occasional pain and discomfort in his right arm. According to what Mr. Lam informed his own doctor, Dr. Ko, the pain occurs about 2 to 3 times a week, lasting several minutes each occasion. No medication is required. Mr. Lam also considers the 10 cm surgical scar on his right front arm to be unsightly, and this causes him embarrassment. He also claims that his right arm is weaker than before, and is painful when exerted. Mr. Lam claims that his arm tires easily when lifting heavy things. He claims to Dr. Ko that he gets tired during activities in writing and using the computer, and requires 5 minutes rest after 30 minutes of continuous work. He claims that his weight lifting capacity is limited to below 25 to 30 pounds.
5. From the medical examination conducted by Dr. Ko on 26 January 2007, and the medical examination conducted by Dr. Lam on 30 July 2008, I do not see that there is much impairment in Mr. Lam's shoulder and elbow movement. Dr. Lam's examination in July 2008 reveals that there was no muscle wasting, and Dr. Lam noted that Mr. Lam was using both his arms effectively and that the 1 cm discrepancy in forearm as noted by Dr. Ko in January 2007 was no longer present. Dr. Lam further noted in July 2008 that there was good shoulder and elbow movement, and that the limitation in shoulder abduction and elbow motion previously noted by Dr. Ko were no longer present.
6. Mr. Lam admits that although he did not play sports as frequently as before, the reason was not solely because of the accident. He claims that as a result of his injury, he now finds it difficult to carry heavy items such as a big document case, or even a laptop computer, and that this has affected his work.
7. Although Mr. Lam's injuries are not insubstantial, it would appear from the medical reports that he has made a good and full recovery. Having considered the extent of Mr. Lam's injuries and disabilities, the degree of permanent impairment, the limited loss of enjoyment in life and amenities, and taking into account the cases cited by Counsel, I consider that an appropriate award for Mr. Lam's pain, suffering and loss of amenities is **$230,000**.

***Pre-trial loss of earnings***

1. Mr. Lam was given 68 days of sick leave. I accept his evidence that he was earning an average monthly income of $32,810.25. The award under this head is: $32,810.25 x 68/30 = **$74,369.99**.

***Loss of earning capacity***

1. Having considered the medical reports and heard Mr. Lam in evidence, I am not satisfied that his injury has any significant impact on his work as an investment consultant. He has successfully returned to his work, and he admits that the drop in his income is caused by the recent economic climate rather than his injury. On the evidence, I am not satisfied that there is any real or substantial risk of Mr. Lam losing his employment, or that he suffers a disadvantage in the labour market.

***Future medical expenses***

1. Notwithstanding the different views of the doctors, Mr. Lam's evidence is that he has decided to undergo the further procedure to remove the implant in his arm. According to Dr. Ko, the costs are in the region of $35,000 to $42,000 and Mr. Lam will require 2 to 4 weeks of sick leave and rehabilitation treatment. I will make an award of **$55,000** under this head.

***Special damages***

1. These are agreed at **$2,541**.

**Award**

1. The total award for damages, including the agreed items, is :
   1. PSLA $230,000
   2. Pre-trial loss of earnings & MPF $ 74,370
   3. Medical expenses & transportation expenses $ 2,541
   4. Future medical expenses & sick leave $ 55,000

**Total : $361, 911**

1. I will award interest on the award of PSLA at the rate of 2% per annual from the date of the writ to the date of judgment, and on the award of special damages at half the judgment rate from the date of the accident to the date of judgment.

1. I will further make an order nisi that the costs of the main action are to be paid by the Managers to Mr. Lam, with certificate for counsel, to be taxed if not agreed. Mr. Lam’s own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Mr. Neal Clough, instructed by Messrs. Au & Vrijmoed (assigned by D.L.A.), for the Plaintiff*

*Mr. Samuel Chan, instructed by Messrs. Leung & Lau, for the Defendant*

1. The incident report of Miss Lau’s accident records that another security guard arrived at the

   scene of Miss Lau’s accident at 5:53 p.m.. [↑](#footnote-ref-1)