DCPI 2188/2020

[2023] HKDC 727

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2188 OF 2020

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BETWEEN

SWARNJIT KAUR Plaintiff

and

LO’S CLEANING SERVICES LIMITED Defendant

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Before: Deputy District Judge George Lam in Court

Dates of Hearing: 28 February and 1-2 March 2023

Date of Judgment: 31 May 2023

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JUDGMENT

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*INTRODUCTION*

1. This is the trial of a personal injuries action in which the plaintiff, a cleaner, claims against her employer (the defendant) for damages arising from the right knee injuries she sustained in an accident that happened at work.
2. The defendant disputes both liability and quantum.

*The accident*

1. The accident happened on 23 October 2018. It was around 9:00 pm when the plaintiff was attending her evening shift (starting from 3:30 pm) as a cleaner at the Cathay Pacific Catering Center in the Hong Kong International Airport, Chek Lap Kok, Lantau Island.
2. The plaintiff was under the employment of the defendant company, a contractor of Cathay Pacific Catering Services (“Cathay Pacific”). The defendant company provides cleaning services for the tableware (or cutlery) unloaded from various airlines. The plaintiff’s job duty was, other than collecting and sorting the washed tableware, mainly to move all the boxes, filled with clean tableware and being stacked near the rear end of the cutlery washer machine (machine no 9), to the conveyor belt of the bin collection system behind the washer machines.
3. At the material time, the plaintiff was moving, from machine no 9 to the bin collection system behind machine no 7, a stack of 5 boxes of tableware forming a column placed over on a cart.
4. When she reached the bin collection system there, she held the cart’s wheel in place by her foot and used both her hands to lift the topmost box (which was up to the height of her chest) and put it onto the conveyor belt of the bin collection system.
5. However, at that moment, and for reasons to be ascertained later in this judgment, the remaining 4 boxes on the cart collapsed towards her and hit her right knee. She lost balance but, luckily, she did not fall down or bump her head on the floor as some other boxes behind her prevented the happening. Nonetheless, she sustained an injury to her right knee.
6. She was then taken to rest in the office. As there was still bruising and tenderness over her right knee and she could not walk even after having rested for two hours, an ambulance was called. She was admitted to the A&E Department of North Lantau Hospital for treatment.

*The plaintiff’s case*

1. The plaintiff appears in person at trial. Whilst she had been formerly represented by solicitors assigned by the Legal Aid up to July 2022 when the legal aid certificate was discharged, she had the benefit of having all the Statement of Claim, Statement of Damages, and Witness Statement being drafted by solicitors.
2. According to the Statement of Claim, it is the plaintiff’s contention that the defendant has basically (a) failed to provide a safe system of work, (b) failed to take all reasonable care and precautions to safeguard the safety of the plaintiff when she was carrying out her duties at the workplace, and (c) failed to provide the plaintiff with any adequate supervision or to assess the risks of the tasks which required the plaintiff to perform and thereby exposing the plaintiff to unnecessary risk of injury of which the defendant knew or ought to have known. The plaintiff contends that the failure on the part of the defendant had caused the accident and injuries in respect of which the plaintiff’s claim was made. The plaintiff also relies on the doctrine of *res ipsa loquitur*.
3. In terms of particulars, the plaintiff’s complaint is that (a) the stackable boxes and the carts provided by the defendant are unsafe (as described as unstable and wobbly in the pleading); (b) the floor at the workplace was wet (though, as pointed out by the defendant, it was not pleaded but only mentioned in her Statement Report and witness statement); and (c) she was under great pressure when she carried out her work at the time of the accident (this should be understood as one of the causes in exposing the plaintiff to unnecessary risk of injury as pleaded in the pleading).
4. The plaintiff’s claim is based on the following causes of action:
   1. Negligence, in breach of duty of care, in common law;
   2. Breach of statutory duties under section 6 of the Occupational Safety and Health Ordinance, Cap 509;
   3. Breach of contract of employment; and/or
   4. Occupier’s liability under the Occupier’s Liability Ordinance, Cap 314.
5. The parties accept that the particulars of the first three causes of action were similar and overlapped.

*The defendant’s case*

1. The defendant is represented by counsel, Mr Francis Chung.
2. In defence, it is the defendant’s contention that (a) the plaintiff has received safety training and guidelines in relation to the transportation of boxes containing tableware; (b) in particular, the plaintiff has been instructed not to place more than 3 boxes of tableware onto a cart for transportation; and (c) placing and transporting 5 boxes of tableware on a cart has contravened the safety instructions and guidelines given to the plaintiff. The defendant also contends that the occupier’s liability is not relevant insofar as this action is concerned.
3. The defendant made two admissions: First, the defendant was the employer of the plaintiff, and the defendant owed the duty of care to the plaintiff in relation to safety during work.
4. Second, the defendant would accept that if the court finds that there was a failure of the defendant to take all reasonable care and precautions to safeguard the safety of the plaintiff under the common law negligence, the same would apply to hold against the defendant for the breach of statutory duty and the breach of implied contractual duty on the part of the defendant. The defendant would not challenge any distinction amongst these three causes of action.
5. As pleaded, the defendant claims contributory negligence against the plaintiff.

*Issues*

1. Counsel for the defendant submitted in his opening that the major issue for this trial is whether the defendant had carried out reasonable measures to ensure the safety of the plaintiff in the circumstances.
2. The defendant originally disputed whether the accident had occurred. During its opening submissions, the defendant conceded that the accident did occur, but would dispute how the accident had occurred.
3. Hence, it is common ground between the parties that the issues should be subdivided as follows:
   1. How did the accident happen?
   2. Whether the defendant, as an employer, was in breach of its common law, statutory and/or implied contractual duties owed to the plaintiff?

In which case, the essential question is whether the defendant had provided a safe system of work?

* 1. If liability is established, whether the plaintiff is liable for any contributory negligence; and if so, the degree of her contributory negligence.
  2. As to quantum, what is the appropriate sick leave period to which the plaintiff is entitled?
  3. The defendant would dispute the amount of damages under each head of the plaintiff’s quantum claim.

*The witnesses*

1. The plaintiff gave evidence by herself. She called no other witnesses.
2. For the defendant, I heard oral evidence from Mr Wong Chi Kit (“Mr Wong”), the operation manager of the defendant.
3. The defendant had filed another witness statement from Madam Hung Mei Lang, the defendant’s foreman (forewoman). Mr Chung informed the court that the defendant would not call Madam Hung to give oral evidence. This court considered that there was no prejudice to the interests of justice to exclude the statement of Madam Hung in the circumstances of this case (s 47(1), Evidence Ordinance, Cap 8). Madam Hung’s witness statement was not admitted as evidence.
4. As for medical expert evidence, the Joint Orthopaedic Expert Report compiled by Dr Lam Chi Keung Johnson for the plaintiff and Dr Ho Ching Lun Henry for the defendant dated 3 July 2021 was ordered by consent to be adduced without oral evidence.

*Credibility of the witnesses*

1. I have heard the oral evidence given by the plaintiff. She answered questions straightforwardly and without any moment of hesitation. She told the court what she had known and had not known about the happening of the accident. She gave detailed accounts of the work procedures in an unshaken manner. She impressed me as an honest witness. I accept her evidence. And I prefer her evidence when the defendant’s evidence conflicted with hers.
2. Conversely, the evidence given in court by Mr Wong for the defendant was not satisfactory. From time to time, he failed to answer questions directly. He was evasive, and his evidence was somewhat repetitive. I gained the impression that he was not giving a true account of the working conditions at the workplace. I found his evidence to be not reliable.

*LIABILITY*

*Background*

1. The following background information is not in dispute.

*Employment history*

1. The plaintiff was born in India and she came to Hong Kong in 1997 when she was at the age of 21. At the time of the accident, she was 44. She used to work as a laundry worker in different laundry companies ever since 2003. However, the plaintiff did have some experience working as a cleaner when she had worked intermittently for the defendant at the Cathay Pacific Catering Center since 2005. The second last occasion she worked for the defendant was in 2011 when she worked there for a few months.
2. On 1 October 2018, the plaintiff returned to work for the defendant again. At this time, the plaintiff was assigned to work at machine no 9, which is for washing the tableware discharged from the business class of the airlines. Although it was not the first time she worked at machine no 9, it was the first time for her to work as staff no 10 there. Staff no 10 was the last worker of the team and was assigned particularly, together with staff no 9, to station at the end of the washer machine to transport the boxes to the bin collection system.
3. As the tableware for the business class was made of ceramic (instead of plastic that was for the economy class), one can imagine the boxes filled with such tableware would be much heavier.

*The workplace*

1. According to the drawing made by the plaintiff in the Statement Report dated 31 May 2019, the working area where she worked had five sets of washer machines, machine no 7 to machine no 11. It is not disputed that these washer machines are large dishwashing facilities and lined up row by row parallelly with an aisle separating them. At each washer machine, workers stationed at the front end of the machine were responsible for placing the dirty tableware received from the airlines onto the rolling belt of the machine. Tableware would be washed inside the middle console of the machine. Then, workers stationed at the rear end of the machine would be responsible for sorting the tableware that came out from the rolling belt into groups and placing them into different container boxes, which would then be transported to the bin collection system by the last assigned workers (ie worker no 9 and worker no 10, the plaintiff).
2. As shown in the photo (page 124-1 of the Trial Bundles) (“the photo”), there was a walkway, approximately 2 meters wide, between the washer machines and the bin collection system, which ran alongside the walkway and was set perpendicularly opposite to the rows of washer machines. That means, the workers (including the plaintiff) assigned to transport the boxes would just need to move the stacked boxes (3 boxes placed on a cart) from the area of the washer machine to the corresponding area of the bin collection system within a body-turning distance. And that was the normal job duty to be carried out by the plaintiff. The plaintiff described it as her “daily routine.”
3. However, it is not disputed that, on the day of the accident, the conveyor belt of the bin collection system behind machine no 9 was not operating as a result of which the plaintiff was required to either transfer the boxes to the bin collection system behind machine no 7 or to the storage area farther away from the washer machines upon the foremen’s instructions.
4. The distance between machine no 9 and the bin collection system behind machine no 7, described by the plaintiff, was approximately the distance from the witness box in the courtroom to the lift lobby of the court’s floor. It was not disputed by the defendant. I note that the distance would be approximately 15 to 20 meters and it corresponded with the space shown in the photo.

*The boxes and the carts*

1. The boxes mentioned above are plastic container boxes available at the workplace for storing and transporting tableware. They are identical and each in the size of 60 cm (L) x 40 cm (W) x 25.5 cm (H). There is no lid on the boxes. As their color is red, they were commonly referred to by the workers as “Hung Lor” (紅籮). For convenience, the parties just referred to those container boxes as “the boxes” at trial and I will adopt the same in this judgment.
2. The boxes are stackable with an indent rim at the bottom of each box, which enabled the box to be stacked one on top of the other. These are just a common type of plastic containers that we can easily find in the market.
3. There were also carts being provided. Each cart itself is a piece of metal frame, laying flat, having four wheels attached at the underneath corners. The height of the cart is just about 12 cm including the wheels. The frame is the exact same size as the bottom of the box so that the indent of the box would fit well into the cart perfectly. It is compatible with the stacking method of the boxes.

*Whether the defendant had provided a safe system of work?*

1. In our present case, a system of work includes tools and equipment. This is how I perceive, in the course of writing this judgment, these two categories of employee safety would have a certain degree of overlapping.
2. In *Alam Zafar v Cheuk Fung Engineering Co Ltd* [2022] 5 HKLRD 978, HH Judge Andrew Li set out the relevant principles, which I would gratefully adopt:

“59. Bokhary PJ (now NPJ) laid down the well-established principle in *Cathay Pacific Airways Ltd v Wong Sau Lai* [2006] 2 HKLRD 586 (FACV1/2006, 23 May 2006) at §24:-

“Of course the duty of care owed by employers to employees at common law is a single duty to take reasonable care for his employees’ safety. This is so even though it is convenient to think of the duty as involving the provision of safe co-workers, a safe place of work, *safe equipment*, a safe system of work, proper instructions and supervision and (where called for) adequate training. As Lord Keith put it in *Cavanagh v Ulster Weaving Co. Ltd* [1960] AC 145 at p.165, “[t]he ruling principle is that an employer is bound to take reasonable care for the safety of his [employees], and all other rules or formulas must be taken subject to this principle”.

60. While the defendant was clearly the employer of the plaintiff, there was a serious risk of injury when the Foreman representing the defendant instructed something contrary to the company’s policy and demanded the plaintiff to work … It seems clear to me that the defendant was in clear breach of the employer’s non-delegable affirmative duty of safe equipment and safe system.”

1. In the instant case, the tools and equipment provided by the defendant were just the boxes and the carts as set out in the previous section. However, it is more important to note that, under the defendant’s system of work, the working procedures were for the workers to stack up the boxes in order to transport the tableware with the cart.
2. According to Mr Wong’s evidence, Mr Wong or the supervisors, during the job briefings or training sessions, would give instructions and demonstrations to the workers for the following working procedures: (1) each box should be half-filled with the tableware and should not be exceeding 18 kgs; (2) the workers were then required to place 2 empty boxes on top of the cart before putting the top box filled with tableware; and (3) in any event, the workers were not allowed to put more than 3 boxes onto the cart for transportation. Mr Wong explained that the rationale for putting 2 empty boxes at the bottom was just to raise the height of the top box (ie the 3rd box filled with tableware) to match the level of the conveyor belt of the bin collection system for ease of lifting. He referred to these steps as “*the safety instructions*” or “*the safety guidelines*” of the company and said that it had been informed to all the workers. The plaintiff accepted that it was the case.
3. However, the plaintiff pointed out that the above-mentioned safety instructions would only apply to the general situation where they were required to transport the boxes of tableware from the rear end of the washer machine to the bin collection system directly behind that machine (ie a very short distance).
4. It was the plaintiff’s evidence that, for special situations, for instance when the conveyor belt of the bin collection system broke down, which is exactly the situation at the time of the accident, the workers were required to transport the boxes of tableware to a farther distance. She said that sometimes they would be instructed to transport those boxes to a storage area located far away (way beyond what the photo can show) and the boxes would be placed and stacked on a pallet there pending pick up by Cathay Pacific workers using a forklift, and sometimes they would be instructed to move the boxes to the conveyor belt behind another washer machine. For instance, she said that, at the time of the accident, she was required to transport the boxes from machine no 9 to the conveyor belt of the bin collection system behind machine no 7.
5. The plaintiff continued in evidence that, for both destinations during the special situation, she would have to move 4 or 5 boxes (all filled) at a time as it would be more convenient and save time, instead of going back and forth more frequently. She said *“Everyone worked there would do so in those situations and that was including the foremen.”* She said the foremen wanted the workers (including the plaintiff) to stack more boxes on the cart each time so that the machine would not be halted. She pointed out in the photo that it showed there were many stacks of 4 or 5 boxes each placed on a cart and parked at the rear end of the washer machines. The plaintiff described to the court that it was the actual working conditions or practice at the workplace and that it was what happened at the time of the accident. The plaintiff accepted that it was not often for the conveyor belt to have a breakdown, but if it was broken, it would sometimes last as long as two days.
6. The plaintiff also drew a distinction between the supervisors and the foremen. She said the supervisors would have stopped them if they saw the workers stacking up more than 3 boxes on the cart, but not the foremen. She said the supervisors were usually not present at the workplace, whereas the foremen were working together with the workers every day. She said that the foreman was the one who usually stayed nearby, either in front of the machine or at the back of the machine. She said that it was the foremen who put pressure on them to finish the work quicker. And she said that, if the boxes were sometimes too heavy, she would ask the foremen or other co-workers for help.
7. The plaintiff further said that, even on a normal work day when the conveyor belt was in operation if they had to work at machine no 9, they would have to fill up all three boxes with tableware before stacking them on the cart for transportation. She said that it was the foreman who asked her to do so because machine no 9 was for business class tableware and it usually had been very busy. She said they were under great pressure and time constraint in clearing all the boxes.
8. Having considered both parties’ evidence, I accept the plaintiff’s evidence and believe that she has given a true account of what happened in everyday working conditions (including the day of the accident) at the defendant company. I accept her evidence that the safety instructions were never followed at machine no 9. Nor had it been followed during the special situation eg when the conveyor belt was not operating. I also accept her evidence that the reason why the safety instructions were not followed was that the foremen directed her so to do and pressured the worker including the plaintiff to work faster. I find the plaintiff as a reliable witness and I find the account of events she has given was logical and reasonable. I will give further reasons after I make my finding on Mr Wong’s evidence.
9. On the contrary, I am unable to agree with any part of Mr Wong’s evidence in relation to the safety measures. I find that the defendant had not provided a safe system of work (including proper tools and equipment) to the plaintiff. My reasons are as follows.
10. First, the way that the defendant instructed the workers to stack 2 empty boxes at the bottom on the cart before adding the top box, filled with tableware, seems inherently hazardous. Usually, if one intended to move some boxes, one would only put the heavier boxes at the bottom, and gradually the lighter ones on the top. Otherwise, the stack of boxes would likely be toppled over, or the top box would skid out, when pushed.
11. It was revealed from the evidence given in court that there was actually no handle on the cart. The only photo provided by the defendant in relation to the accident was a screenshot of the CCTV footage showing the plaintiff moving a stack of 5 boxes a few minutes before the accident. The photo, without the video footage being provided, was misleading as to whether the plaintiff was pushing on the handle of the cart or on the boxes. I have expressed my dissatisfaction relating to the absence of video footage for the accident at trial and I shall elaborate further in the next section of this judgment.
12. In any event, it has been clarified by the parties at trial that the cart has no handle and the only way to maneuver the cart or the boxes was to push against the column of boxes themselves. In my view, this method of transporting boxes is very dangerous and, indeed, behind the times.
13. Mr Chung submits that, even if the cart was not installed with a handle or was not installed with any wheel-locks (as complained by the plaintiff), there was nothing unsafe about the cart. He said that, in fact, the plaintiff had admitted the cart was in good condition. It is Mr Chung’s submission that the mere foreseeability of a risk does not give rise to a breach of duty if it is one which could be met by employees taking obvious precautions (*Jaguar Cars Ltd v Coates* [2004] EWCA Civ 337). He submits that, in *Jaguar*, the English Court of Appeal held that steps without a handrail posed no real risk to those using them with reasonable care and that the trial judge, who held there to be a breach, had “erred by equating foreseeability of risk with a finding of a duty to install a rail.” He therefore urges this court not to equate the foreseeability of the risk with the employer’s duty to provide a cart with the handle to the plaintiff.
14. However, Mr Chung just seems to have missed the point here. The case of *Jaguar* is distinguishable on facts. In *Jaguar*, it was a case about a worker, whilst going up a short flight of steps at the workplace, tripped, fell and got injured. The English Court of Appeal found that it was wrong for the trial judge to have concluded that failure to provide a handrail for those steps was negligence. The Court of Appeal said that those were ordinary sort of steps and if the trial judge was right, no that kind of steps would be considered safe without a handrail.
15. In my view, *Jaguar* is not applicable here for the simple reason that people can walk up a flight of steps with or without the need of holding onto a handrail. Whereas in our present case, if there is no handle on the cart, the only way to move or maneuver the cart was to push against the column of boxes stacked on it. Any boxes in the stacked column could have been skidded or displaced if pushed, or virtually caused the column to collapse or topple over. As I have found, it is very dangerous to the users, given the amount of weight load, the moving distance required, and the practice of work at the workplace.
16. Moreover, the steps or stairs concerned in *Jaguar* were not a system of work or tools and equipment, which are the crux of the issues in our present case. Therefore, I do not think that *Jaguar* can assist the defendant here.
17. Secondly, this court also expressed concerns about how heavy the boxes were. In his witness statement, Mr Wong exhibited some photos showing the respective weight of boxes loaded with different kinds of tableware in support of his contention that any boxes that exceeded the prescribed weight would be rejected by the staff of Cathay Pacific working at the conveyor belt.
18. Mr Wong said that according to the photos which are part of their company records, a box half-filled with *ceramic plates* weighed approximately 21 kgs (I note that it already exceeded the 18 kgs maximum restrictions under the defendant’s own safety instructions). A box filled with ceramic bowls and other ceramic items would weigh approximately 10 kgs. On the contrary, a box filled with *plastic cutlery* would only weigh 5 or 7 kgs, and in any event, plastic cutlery would not weigh more than 10 kgs. Mr Wong said that *“those weights would not exceed what is manageable by the workers.”*
19. I venture to visualize how heavy the weight of 21 kgs of ceramic tableware is: it would be comparable to lifting up a piece of check-in baggage which was allowed at 23 kgs maximum for economy class (for most airlines). Therefore, I could hardly envisage how a lady could lift a 21 kgs box of tableware and place it on top of 2 empty boxes for moving without fail. In my view, this is certainly not “manageable by the workers”. In this scenario, I accept the plaintiff’s version that, at machine no 9, she had filled the bottom 2 boxes with ceramic tableware as well. In any event, 21 kgs exceeded the defendant’s safety restrictions of 18 kgs maximum. It occurred to me that the defendant was well aware of such violation, and there was no sign of any extra measures being taken by the defendant to correct the same.
20. Thirdly, there were no safety instructions to cope with any special situation, eg when the conveyor belt was broken down. The plaintiff was required to transport for a much longer distance. The plaintiff said she was under great pressure in that situation. She said she was yelled at repeatedly by the foreman to clear the boxes quicker. She said the pace of the dishes coming out from the washer machines would not change. She said she was staff no 10 at machine no 9. She was assigned to work at machine no 9 with staff no 9 together. However, at the time of the accident, her co-worker (staff no 9) was on break. Hence, she had to clear the boxes all by herself.
21. I accept the plaintiff’s evidence. In my view, assuming the speed of the rolling belt of the washer machine and the number of workers remained unchanged (and there was no suggestion of the otherwise in evidence), the plaintiff would have been required to rush to push 3 boxes on the cart or to stack more boxes on the cart in order to compensate the time loss when transporting the boxes to a much further distance. Either way, the plaintiff was exposed by the defendant to further hazards or risk of injury. And any accident, such as the collapse of the boxes, would actually be foreseeable. In reaching this conclusion, I have not yet taken into account the fact that a co-worker would be on break without a substitute worker in place to assist the plaintiff. As the plaintiff said, and I agree, she was under even greater pressure when her co-worker was on break at the time of the accident.
22. In my judgment, this case is the exact situation where companies sometimes write safety instructions that practice never followed. In such situation, the safety of the employees still cannot be safeguarded, and negligence remains on the part of the employer.
23. Meanwhile, Mr Wong even for himself, found it unsatisfactory about the tools and equipment provided by the defendant to the workers. Mr Wong answered the court at the end of his evidence that:

“Court: Mr Wong, does it ever make sense to you, when either you or the training instructor has to inform the workers, that they have to put 2 empty boxes at the bottom in order to fit the height of the conveyor belt, instead of providing a proper trolly with the height that fits for the conveyor belt?

Mr Wong: (This is embarrassing …) When all these boxes and trollies (the hardware) were provided by Cathay Pacific, we’ve just provided the manpower. So, for the hardware, *we have reflected it to them*, but …”

1. By reasons of the aforesaid, I hold that the defendant had not provided a safe system of work, including the proper tool and equipment, for the plaintiff to carry out her work duties at machine no 9, and to transport the boxes of tableware to the bin collection system behind machine no 7. I find that the defendant had provided no special precautions or measures to ensure the safety of the plaintiff in handling the business class tableware, which was much heavier than the plastic tableware washed in other machines. I do not consider that there would be any discernible difference in liability whether the tools and equipment were provided by Cathay Pacific or the defendant themselves.
2. An employer should use all endeavors to ensure a safe system of work for the employees. There is no excuse for not providing the proper tools or equipment for the employees to have proper execution of their job. I find the employer instructing the employees to stack two empty boxes in order to raise the height for loading a box of tableware totally unacceptable. I also find that the way that the workers had to push against the boxes in maneuvering the cart was likewise unbelievable. In the absence of proper equipment, this no doubt put the workers at unnecessary risk of injury more than anything else. I find that the defendant has failed to take reasonable care of the plaintiff’s safety at work.
3. In the circumstances, I hold that, based on the above factual findings, negligence on the part of the defendant has been proved.

*How did the accident happen?*

1. I shall now deal with the question as to how the accident happened. This question was understood between the parties as what caused the collapse of the remaining 4 boxes? There was conflicting evidence from the parties.
2. It was the plaintiff’s evidence that she was pushing 5 boxes of tableware from machine no 9 to the bin collection system behind machine no 7. She said, when the remaining 4 boxes collapsed towards her, she did not know why the column of boxes fell. She said “I actually don’t know what happened because the accident just happened and I fell down.” And as she complained in the Statement Report and the witness statement that the floor was wet. She also complained in her witness statement that “when we put more than 3 containers on the cart it became unstable and wobbly.” In cross-examination, she also said “Because of the wet floor, it becomes slippery. And because of the slippery surface, the trolley slipped, and also the foot slipped. … I believe that the trolley slipped from there and that’s why the column fell on me.”
3. It is clear from the plaintiff’s evidence that she was having 5 boxes all filled with tableware on her cart. I accept that it was the case because, as I explained earlier, there needed to have some weight at the bottom boxes, otherwise the heavy ones on the top would have caused the stack of boxes to topple over in the process of transportation.
4. As for the defendant, Mr Wong said that he watched the CCTV footage which captured the happening of the accident. He said the video showed that, when the plaintiff was lifting the top box (the 5th one) to place it onto the conveyor belt, she did not raise it high enough and it tripped the rest of the boxes and caused the fall on her.
5. Although it might have been logical to say that the plaintiff tripped the remaining boxes, I find it unsafe to accept the account of events put forward by the defendant. I just cannot accept the defendant’s version as the defendant could have provided the CCTV footage to show the happening of the accident but it chose not to do so.
6. Where is the CCTV video record? The photo showing the scene of the accident first appeared in the plaintiff’s witness statement. It was a black-and-white photo shown in the trial bundle. According to the plaintiff, she obtained it from her co-worker, who made a screenshot photo of the training material during a training session given by the defendant after the accident. She said the defendant used it to show the workers not to stack more than 3 boxes on the cart. At the beginning of the trial, the defendant provided a color copy of the photo to the court in order to show that the defendant was clearly moving 5 boxes on the cart.
7. However, this court was concerned about why the CCTV record has not been produced. Mr Wong explained that, immediately after the accident, he went to view the CCTV video footage together with other management staff. He said, however, the CCTV footage belonged to Cathay Pacific and Cathay Pacific would not provide a copy of the video to *any third party*. He said he was only allowed to take a screen capture of the CCTV footage for internal training purposes.
8. This court was not satisfied with the defendant’s answer that the defendant only obtained a screen capture of the plaintiff pushing 5 boxes on the cart for internal training purposes, but not making any effort to preserve the relevant CCTV footage in relation to happening of the accident. When asked “Whether Cathay Pacific only allowed you to capture a printout from the screen, but did not allow you to have a copy of the video,” Mr Wong replied “It happened a long time ago” and “I do not remember.” I have serious doubts about that answer as he had just told the court a minute ago that it was Cathay Pacific which refused to give out the CCTV footage.
9. I do not find Mr Wong was telling the truth. In fact, his answer was entirely contradictory to what he said in his witness statement. In his witness statement, he said “I have requested Cathay Pacific Catering to keep record of the CCTV footage described above. However, I understand from Cathay Pacific recently that these footages were not kept and therefore Lo’s is unable to provide the same.” In it, he never mentioned Cathay Pacific refused to give the CCTV footage to the defendant, instead, he was suggesting that it was Cathay Pacific’s fault for not keeping a record of the footage even though it was requested to do so.
10. In these circumstances, I find that the defendant did have access to the CCTV footage in relation to the happening of the accident but chose not to preserve or produce it after watching it. I draw adverse inference against the defendant that the CCTV had shown the events preceding or at the time of the accident that were not in the defendant’s favour. I also draw adverse inference against the defendant that the CCTV footage would corroborate the plaintiff’s account of the actual practice and working procedures on the day of the accident.
11. I find also that it is nonetheless unsafe to accept what Mr Wong described as tripping the boxes. If it were the case, the plaintiff could not be quick enough to place the top box to the conveyor belt before the fall of the remaining boxes hit her. And if it tripped, the remaining boxes would fall in the same direction as the conveyor belt, and not collapse towards the plaintiff’s body.
12. I find that the fall of the stack of boxes would be most likely due to the unstable and wobbly condition of the boxes and, probably, the cart skidded. This may have been caused by the stacking up of heavy boxes (all filled with ceramic tableware). I also noted the situation that, when the plaintiff was lifting the top box with both her hands, it would mean that her hands were removed from, and no longer possible to hold, the remaining stack of boxes. Due to the weight and the wobbly condition, it would not be surprising that the remaining stack of boxes fell.
13. Remarkably, the plaintiff made the following oral closing submissions:

“P: This case would have been a lot easier because there was a CCTV camera just above Machine No 9. So they could have seen how we were working. They just provided one photo, which is in their favor, seeing me bringing 5 boxes. But they didn’t provide the evidence about other facts which can easily point to the problem. Because when there was a lot of work, that is the procedure which I was following and I don’t know why they are changing their evidence now. I never wanted to get injured. When I got injured, I am the one who suffered the loss. And I know those. I’ve still suffered from aches. That’s all.” (Translated by interpreter)

1. I agree.
2. I find that the plaintiff, in moving 5 boxes on a cart and unloading the top box onto the conveyor belt at the time of the accident, was in the course of carrying out her job duties and was performed under the instructions of the foreman of the defendant company.
3. I also find that if the defendant had provided a safe system of work (including the proper tools and equipment) and proper safety measures and supervision, the accident would not have happened.

*Occupier’s Liability*

1. Although I am inclined to accept the plaintiff’s evidence that the floor was wet, this material fact was not pleaded and I do not consider it to be a cause of the accident.
2. Mr Chung submits, and I agree, that this case involved only “activity duty”, namely the dangers arising from the lifting of the boxes of tableware, and the accident was not due to “the state of premises”, and thus the Occupier’s Liability Ordinance has no application in this case (*Tort Law and Practice in Hong Kong*, 3rd Edn, para 11.031; *Luen Hing Fat Coating & Finishing Factory Limited v Waan Chuen Ming* [2011] 2 HKLRD 223).

*Contributory Negligence*

1. Mr Chung submits that, in putting 5 boxes at a time on the cart for moving, the plaintiff was taking a shortcut for her own convenience at the expense of her own safety. Therefore, the defendant claims 30% contributory negligence against the plaintiff.
2. I do not agree. I do not find that the plaintiff stacking 5 boxes for transportation was for her own convenience. I have already found that the defendant did not take any extra measures to cope with the special situation when the conveyor belt was not operating. The number of hours the plaintiff needed to work was fixed. It was the plaintiff’s evidence, which I accept, that the number of dishes coming out for clearance was not under her control and it would all depend on the system of work and the pace of the washer machine. She said, therefore, she had to move more boxes at a time in order to clear the boxes and that was the practice followed at the workplace. She said if she did not clear the boxes fast enough, the foremen or other co-works would shout at her, or the washer machine would come to a stand-still. I accept her evidence.
3. I find that the defendant’s supervisors (when they did the inspection check) knew that the safety instructions were not followed when the workers transporting the boxes to a distant area. However, they did not take any extra measures to remove such work hazards or to stop that “practice”. It was also the evidence of the plaintiff, which I accept, that the defendant’s foremen were even involved in transporting the boxes by themselves, or together with the other workers. In any event, I accept the plaintiff’s evidence that she had to move 5 boxes at a time on the cart in order to complete her work duty, and that was carried out under the “supervision” of the foremen and working conditions or practice at the workplace. Therefore, the claim for contributory negligence must fail.

*QUANTUM*

1. On 23 October 2018, the plaintiff was admitted to the A&E Department of North Lantau Island at 22:59. She was diagnosed as having bruises and tenderness over her right patella. The range of movement of right knee was limited (10-50 degree). However, an X-ray of her right knee showed no fracture. The plaintiff declined admission for further assessment and preferred observation at home. She was discharged after 3 hours on 24 October 2018. Sick leave was granted from 23 October 2018 to 29 October 2018.
2. On 26 October 2018, because of the persistent pain, the plaintiff was admitted to the Orthopaedics and Traumatology Department of Tuen Mun Hospital (near where the plaintiff lives). Physical examination showed right knee bruising without effusion. No external wound or swelling was seen at the right hip and ankle. There was a reduced range of motion at the right knee and hip due to pain. Pain computerized tomography of the right knee showed no fracture. The plaintiff was treated with physiotherapy and analgesics. She was discharged on 1 November 2018. Sick leave certificate was given for the period from 26 October 2018 to 30 November 2018.
3. Since then, the plaintiff received a course of physiotherapy and occupational therapy at Tuen Mun Hospital.
4. The plaintiff attended 19 occupational therapy sessions from 10 January to 20 March 2019. In the last assessment, the plaintiff still failed to perform the squatting task. Her tolerance for walking and standing was inadequate. She demonstrated a maximum lifting capacity of 8 lbs load only. She was still ranked as “not match with previous job demand.” As the progress was static, she was discharged from the work rehabilitation program.
5. The plaintiff has attended 15 sessions of out-patient physiotherapy between 31 December 2018 and 24 April 2019. According to the discharge summary, the plaintiff had an overall improvement of 20%. The range of motion of her right knee flexion was improved from 90 degree to 100 degree with pain, and the extension was improved from 20 degree extension lag to full extension. Her walking tolerance was improved from 10 minutes to 30 minutes with stick. She was discharged from physiotherapy on 24 April 2019. She was referred to continue the exercises at home.
6. Since 1 November 2018, she had gone back to the hospital for consultations and obtained sick leave certificate every two months.
7. In May 2019, the plaintiff complained of neck and back pain since injury for the first time to Tune Mun Hospital. However, it was found there were no neurological deficits. A plain radiograph of the cervical and lumbosacral spine showed no fracture or collapse. Medical assessment by the Employees’ Compensation (Ordinary Assessment) Board was completed in August 2019.
8. Sick leave certificates were given from 26 October 2018 to 6 August 2019.
9. According to the joint medical expert report, both Dr Lam and Dr Ho agreed that the treatment prescribed/delivered and received were appropriate for the plaintiff’s right knee injury. They agreed the diagnoses were soft tissue injury of the right knee. They also agree that, at the time of the joint assessment (16 June 2021), the plaintiff’s right knee injury has reached maximal medical improvement.
10. However, the experts disagreed on the degree of injury. Dr Lam said the clinical picture that followed after the accident suggested a more severe type of soft tissue injury, and that the progress with treatment was gradual and suggested the soft tissue injury was not mild.
11. Dr Ho, on the other hand, said that the injury was not serious. Based on the injury mechanism and the initial clinical examination findings in AED of NLH on 23 October 2018, he said that the diagnosis was “only a minor” soft tissue injury of the right knee. He said that the plaintiff did not fall down upon impact to her right knee, there was no wound, and the X-rays did not show any fractures. He also said that the plaintiff declined admission to the hospital.
12. In my finding, I prefer Dr Lam’s opinion. The length of the courses of treatments received by the plaintiff clearly suggested that the soft tissue injury was not mild. It certainly cannot be described as “only a minor” soft tissue injury. I accept that it was a more severe type of soft tissue injury. As the reason why the plaintiff did not fall on the ground was that there were boxes behind her in preventing that from happening (which I do not think the parties were in dispute), I do not agree with Dr Ho that the fact that the plaintiff did not fall down upon the impact would suggest that was only a minor injury of the soft tissue. His reasoning is inconsistent with his agreement that the courses of treatment the plaintiff received were appropriate.
13. I also find that there should not be any adverse implication when the plaintiff declined admission at North Lantau Hospital. She told the experts that it was because the hospital was far away from her home and she preferred home observation. I find that it was understandable especially when she was a single parent, and she lived with her children at home. Her children were at age 16, 19, and 20 at the time of the accident. It shall be noted that the plaintiff immediately went back to hospital after 2 days even before the sick leave certificate expired (29 October 2018). I accept that it was due to persistent pain which she could not bear. She stayed in the hospital for a few days and was discharged on 1 November 2018.

*Sick Leave*

1. As to the duration of sick leave, Dr Lam opined that considering the severity of the injury, the need for rehabilitation, the progress with treatment, and the pre-accident job demand, the duration of sick leave issued by the plaintiff’s treating specialists/doctors who assessed her from time to time is appropriate and should be endorsed.
2. Dr Ho, on the other hand, said the sick leave for the healing and rehabilitation of the soft tissues of the right knee should not be more than eight weeks (that is about halfway through the courses of treatments). I find it difficult to accept Dr Ho’s opinion here. He did not provide any reason why while he accepted that the courses of treatment received by the plaintiff were appropriate, but inconsistently he said that the sick leave for healing and rehabilitation should be only 8 weeks.
3. Hence, I agree with Dr Lam that the duration of sick leave should be from 23 October 2018 to 6 August 2019.

*Pain, suffering and loss of amenities*

1. As I have found, the plaintiff suffered from a rather severe soft tissue injury of her right knee, and it was solely due to the accident. After the completion of treatments, the plaintiff still complained of some residual pain on her right knee.
2. The plaintiff claims HK$280,000 for PSLA in the Revised Statement of Damages, but revised it to HK$150,000 during her closing submission.
3. Mr Chung refers the court to the following precedents and suggests that the plaintiff should be entitled to no more than HK$50,000 under this head:
   1. In *Tam Yuen Hoi v Chan Muk Sing* (unreported, HCPI 983/2011, 1 August 2003), the plaintiff slipped and fell on the staircase and suffered a mild back and left leg injury at work. The court awarded PSLA in the sum of HK$50,000. (However, the court, in that case, found that the plaintiff was exaggerating the condition of his injuries and rejected the plaintiff’s evidence about the pain he was suffering. The court nonetheless awarded the plaintiff HK$50,000.)
   2. In *Lo Yin Fong v Maxim’s Caterers Ltd* (unreported, DCPI 1242/2009, 15 March 2011) the plaintiff slipped and fell and injured her knees, right hip and shoulders outside a cake shop. And she would be awarded HK$50,000 PSLA if she could establish liability on the part of the defendant. (However, the injuries suffered by the plaintiff in that case were quite mild. She was only granted intermittent sick leave for 62 days and she was able to return to work thereafter. The joint experts concluded that they found nothing physically wrong with the plaintiff and that her condition was more mental than physical.)
   3. In *Lai Ka Yiu v Chan Yiu Kei* (unreported, DCPI 453/2008, 7 January 2009), the plaintiff sustained a minor injury on her neck and back and was awarded HK$50,000 for PSLA. (However, the plaintiff in that case did not undergo regular treatments. The sick leave she got each time was only 7 days on each occasion. The court agreed with the expert that the plaintiff had overstated her symptoms. The court found that the plaintiff had not suffered from any genuine pain and had recovered from her injuries about 1.5 months after the accident.)
   4. In *Alam Zafar v Cheuk Fung Engineering Co Ltd* [2022] 5 HKLRD 978, a general labourer was injured as a result of slipping and rolling down a hillslope and sustained minor injuries to his left shoulder, left elbow and left wrist with no fracture. The court awarded HK$40,000 for PSLA. (However, in that case, the plaintiff was able to take up substituted occupations during the paid sick-leave period (after half year from the accident) and was absent from physiotherapy sessions. Surveillance video footage showed that he was walking normally and his body mobility appeared to be perfectly normal. The court found that there was a gross exaggeration of injuries by the plaintiff.)
4. I consider the injuries suffered by the plaintiff in our present case to be more serious than those described in the above cases.
5. Having considered the above authorities and the facts of this case, I will allow an award of HK$100,000 under this head of claim.

*Pre-trial loss of earnings*

1. The parties agreed that the plaintiff’s monthly earnings immediately preceding the accident were HK$10,650 a month.
2. Therefore, the loss of earnings I would allow for the sick leave period from 23 October 2018 to 6 August 2019 (about 9.5 months) should be HK$10,650 x 9.5 = HK$101,175.
3. As for the period for pre-trial loss of earnings after 7 August 2019, the plaintiff has revised her claim during her closing submissions that she now only asked for 3 months. I find it reasonable to allow her to look for a job after treatments. Hence, I allow an additional 3 months' loss of earnings to the plaintiff: HK$10,650 x 3 = HK$31,950.
4. Her total pre-trial loss of earnings (including MPF) would be (HK$101,175 + HK$31,950) x 1.05 = HK$139,781.25.

*Future loss of earnings*

1. As both experts have concluded the plaintiff should be able to return to her pre-accident job as a cleaner, there should be no award for future loss of earnings.

*Loss of earning capacity*

1. For the same reason, I do not consider that there is any real risk that the plaintiff would lose her employment as a cleaner in the future. I make no award under this head of claim.

*Special damages*

1. The plaintiff claims HK$2,000 for medical expenses and HK$3,000 for reimbursement of travelling expenses. But she has no receipts for them.
2. Considering the number of visits the plaintiff attended the hospital for treatments and consultations, I allow these claims in full.
3. As to tonic food, the plaintiff said she needed to drink soup for her quick recovery. I believe she was referring to herb soup. I would allow HK$1,000 for it.

*Employees’ compensation*

1. It is not disputed that the plaintiff has received HK$123,447 and credit should be given.

*Summary of damages*

1. In summary, the following sum would be awarded plus interest:
   1. Pain, suffering and loss of amenity: $100,000
   2. Pre-trial loss of earnings: $139,781
   3. Future loss of earnings: Nil
   4. Loss of earning capacity: Nil
   5. Special damages: $ 5,000

Subtotal: $244,781

Less Employees’ compensation $123,447

Total: HK$121,334

*Interest*

1. There will be interest at 2% per annum for general damages from the date of the Writ to the date of judgment and interest at half judgment rate per annum on pre-trial loss of earnings and for special damages from the date of the accident to the date of judgment and thereafter at judgment rate.

*CONCLUSION*

1. For the above reasons, I find that the liability of the defendant has been established. I order the defendant do pay to the plaintiff in the sum of HK$121,334 plus interest. I make an order *nisi* that the defendant do pay the costs of this action to be taxed if not agreed. The plaintiff’s own costs up to July 2022 shall be taxed in accordance with the Legal Aid Regulations.

( George Lam )

Deputy District Judge

The plaintiff appeared in person

Mr Francis Chung, instructed by Deacons, for the defendant