## DCPI 225/2016

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 225 OF 2016

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##### BETWEEN

FAN CHI PING Plaintiff

and

GOLDEN RESOURCES WAREHOUSE

LIMITED Defendant

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 26 and 27 July 2017

Date of Judgment: 25 August 2017

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JUDGMENT

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1. This is a personal injury claim brought by the plaintiff in respect of an accident which occurred in the course of her employment with the defendant.

*BACKGROUND*

1. At all material time, the plaintiff was employed by the defendant to work as a warehouse keeper at Golden Resources Centre at 2-12 Cheung Tat Road, Tsing Yi, New Territories, Hong Kong (“the Warehouse”). The defendant was and is a major importer and distributor of rice in Hong Kong.
2. It is the plaintiff’s case that, at or around 10:00 to 10:30 am on 30 December 2013, while she was descending from the 4th floor (“4/F”) to the 3rd floor (“3/F”) staircase of the Warehouse, when she tried to step her foot on one of the stairs, she stepped into the void, slipped, lost her balance and twisted her muscles in her lower limbs (“the Accident”).
3. As a result of the Accident, the plaintiff allegedly has sustained serious injuries to her left knee.
4. The plaintiff had received a total sum of HK$204,905.21 by way of employees’ compensation from the defendant after the Accident under a separate employees’ compensation proceedings.
5. The defendant disputes both liability and quantum in this case but does not dispute the fact that the plaintiff was an employee of the defendant and that she was in the course of her employment at the Warehouse at the material time.

*Issues before the court*

1. The main issues before this court are:-
2. whether the Accident occurred in the manner as pleaded;
3. depending on the answer to (a) above, whether the defendant was negligent and/or in breach of its statutory duty owed to the plaintiff;
4. if the defendant is liable, whether the plaintiff was contributorily negligent and if so, the extent thereof; and
5. the quantum of damages.

*DISCUSSION*

*LIABILITY*

1. According to the statement of claim (“SoC”), the causes of action relied upon by the plaintiff are:-
2. negligence;
3. breach of section 6 of the Occupational Safety and Health Ordinance, Cap 509 (“OSHO”); and
4. breach of contract of employment.
5. The plaintiff also relies on the doctrine of *res ipsa loquitur*.
6. I note that there is no allegation of any breach of common duty of care under the Occupiers Liability Ordinance, Cap 314 in this case. I also note that in the particulars of negligence pleaded under the SoC, the plaintiff has not alleged that the staircase was slippery, broken or defective in any way.

*The Law*

1. The following principles of law are not in dispute between the parties and are applicable in this case.
2. Liabilities under the OSHO are co-extensive with the employer’s common law duty of care towards employees: *Reshad Muhammad v Gurung Amrit Singh t/a EFWA Company Link 200 Joint Venture*, unrep, (CACV 165/2010, 8 July 2011), §§31-33.
3. An employer is only required to take reasonable care for the safety of his workmen and is not obliged by the law to remove every risk that may confront its employees: *Tsang Chung Wan v Li Ming* [1998] 2 HKLRD 354, at 360J-361B; *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209, at 212I-213C, citing *The Wagon Mound (No 2)* [1967] AC 617, at 642E-643A.
4. The burden of proof is on the plaintiff to prove her case as pleaded in the SoC and the Revised Statement of Damages (“RSD”). Although the defendant may not be able to provide any evidence to rebut the plaintiff’s account as to how the Accident happened, the burden of proving how it occurred still rests on the plaintiff: *Tam Yuen Hoi v Chan Muk Shing & Others*, unrep (HCPI 983/2001, 1 August 2003), §21.
5. I agree with the defendant’s counsel, Mr Victor Gidwani, that there are many reasons why the plaintiff might have missed her steps on the stairs. The Accident could be caused by a multiple of reasons in isolation or in combination, including the plaintiff’s own carelessness in not watching where she was going. This is therefore not a case where the plaintiff may rely on *res ipsa loquitur*: see *Tam Yuen Hoi, supra* at §21. As the plaintiff knew exactly why she fell, namely, she had missed the step and stepped into the void, I agree that there is no room for the application of *res ipsa loquitur* in this case.

*The Evidence*

*How did the Accident happen?*

1. The plaintiff was the only person present during the Accident. There was no other eyewitness. Hence, the credibility of the plaintiff is crucial in determining whether there was indeed such an accident, if so, whether the Accident happened in the way as described by the plaintiff.
2. On the whole, I find the plaintiff as an honest and credible witness. It is clear that she was a hardworking and responsible employee who was well esteemed by her co-workers and employer as the defendant’s witness Mr Lee Chi Ming (DW1), her supervisor, has testified in court. Thus, save as otherwise indicated, I accept the evidence given by her in court.
3. I find the Accident occurred in the following manner as contained in the plaintiff’s witness statement and as testified by the her in court.
4. The Warehouse where the plaintiff was working in was a 14-storey building. Each floor had an area of over 10,000 square feet. Staircases were situated at the rear portion of the Warehouse which provided access and egress to and from every floor. There were 2 main entrances to the Warehouse. The car park entrance on G/F was installed with 5 cargo lifts. 2 of those lifts were solely used for the conveying of unprocessed rice and 3 other cargo lifts were used solely for the delivery of processed and retail rice. There was 1 passenger lift for office use which served G/F to 14/F.
5. The G/F level of the Warehouse was a loading and unloading area divided into 3 loading bays. Each bay had its own designated staff who carried out loading and unloading work in that particular area. In total, there were 16 workers working in the loading area at any one time. They would unload sacks of rice from lorries arriving at the Warehouse and would then convey the unprocessed rice to different floors for storage and/or processing. After the rice have been mixed or processed, they were also responsible for loading the processed rice packed in retail packages onto lorries ready for delivery to customers. In short, it was a busy loading area which handled an average of over 300 tonnes of processed and unprocessed rice each day.
6. 1/F of the Warehouse was used for processing, packaging and storage. 2/F and 3/F were used for mixing and storage. 4/F was used for storage of processed rice. Including the plaintiff, there were altogether 3 warehouses keepers employed to do the store keeping job on 1/F to 4/F.
7. When the plaintiff was first employed by the defendant in April 2013, she was only responsible for the auditing of the incoming and finished products on the G/F. From about May onwards, she was also responsible for the storekeeping duties on 1/F to 4/F in the afternoon after completing all her duties on G/F in the morning. From about July onwards, she was assigned to work on 5/F to 13/F. In September, she was transferred back to G/F to do the stock checking duties but had to assist the forklift drivers (for which she has a licence to handle) on 1/F and 4/F to transport the finished products.
8. Since 10 December 2013, after one of the warehouse keepers stationed on 4/F had left the company, the plaintiff was assigned to perform store keeping duties for 1/F to 4/F (except 3/F). Thus, besides her usual duties of storekeeping and checking, she was also responsible for taking over the duties left by her former colleague who was stationed on 4/F.
9. As the 5 cargo lifts were solely reserved for the use of transporting rice from G/F to the upper floors and the passenger lift was for office use and situated on the other side of the building only, the plaintiff usually travelled between 1/F and 4/F by making use of the staircase.
10. On the day of the Accident, the plaintiff clocked-in at work at 7:51 am. The plaintiff did not mention in her witness statement in detail what tasks she was assigned to do that morning. The plaintiff only mentioned that she had to travel many times between 1/F, 2/F and 4/F that morning while the duties on 3/F were carried out by another storekeeper.
11. However, during cross-examination, the plaintiff was able to give a very detailed account of the tasks she had undertaken that morning and the paths she had travelled to and from the different floors. While I have serious reservations as to whether this account, which was given for the first time almost 4 years after the Accident, could be reliable, even giving the plaintiff the benefit of the doubt and assume her account was accurate for the moment, I note that the most the plaintiff had travelled by staircase in order to execute her duties that morning would be 9 times only (including the time when the Accident happened).
12. Mr Henry Fung, counsel for the plaintiff, in his closing submissions, based on the evidence given by her in court, has summarised the activities of the plaintiff that morning as follows:-

“(a) The plaintiff started work at about 0751 hours **[D17]**;

(b) The plaintiff commenced work by taking the lift to 4th Floor of the Warehouse;

(c) Then she took the lift going to Ground Floor;

1. Then she **walked the stairs going up** to 1st Floor to check the goods by walking aisle by aisle;
2. The she **walked the stairs going up** to 2nd Floor to check the goods by walking aisles one by one which lasted for about 10 minutes;
3. Then she took the lift going down (sic) to 4th Floor to check the papers to determine how many goods need to be deliver out whereby she sat down for about 20 minutes at her desk;
4. Then she **walked the stairs going down** to 3rd Floor to give the relevant papers of delivery to her colleague’s desk;
5. The she **walked the stairs going down** to 2nd Floor to think about (構思) how to allocate the goods (執位) which required her to walk the aisles one by one thereat which lasted for about 10 minutes;
6. The she **walked the stairs going up** to 4th Floor to arrange and allocate the goods by (i) walking the aisles one by one to check for empty spaces, (ii) using a 剷車which lasted for over 10 minutes;
7. Then a staff called her on her walkie-talkie to go to 1st Floor;
8. The plaintiff then **walked the stairs going down** to 1st Floor to 補貨;
9. The she **walked the stairs going up** to 2nd Floor to check if the goods are placed correctly which lasted for about 10 minutes;
10. Then she **walked the stairs going up** to 4th Floor to continue to train her colleague;
11. Then a foreman called her on walkie-talkie requested her to go to 2nd Floor because the staff (剷手) cannot find the relevant papers showing what goods needs to be deliver (sic) out. This required her immediate attention because if no goods delivered out, the customers of the defendant may complain. Further, the plaintiff said Mr 李志明had previously (on or about 10th December 2013) informed her that it is important to ensure the goods are delivered out to customers on time, which Mr 李志明had confirmed in his evidence that he made such comment to the staff at a conference;
12. Almost immediately, the plaintiff then **walked the stairs going down** to 2nd Floor during which the accident happened.”

(emphasis as appeared in Mr Fung’s submissions)

1. Thus, the plaintiff claims that she was made to walk up and down the stairs for a total 9 times within a time frame of about 2 to 2 ½ hours. She was also made to walk about 25 to 30 aisles on 1/F and 2/F and about 50 aisles on 4/F. The plaintiff therefore submits that they had caused her tiredness and fatigue which directly led to the Accident. However, rather significantly, I note that this matter has never been pleaded as part of the particulars of negligence or breach of statutory duty against the defendant under the SoC.

1. In my view, considering the fact that the above duties were carried out over a period of 2 to 2½ hours, ie between 8:00 am and 10:00 am (as pleaded in the SOC) or 10:30 am (as stated in the plaintiff’s witness statement), they were neither unduly strenuous nor overly demanding for a fit and healthy person like the plaintiff to undertake:-
2. the plaintiff was not required to walk all 4 floors or in fact for more than 1 to 2 floor distance on each occasion;
3. each floor consisted two flight of 10 steps, ie 20 steps for one floor distance only;
4. she was not required to go up and down the steps within a concentrated period of time, instead the walking was spread out quite evenly;
5. the total steps of the staircase she had taken during that 2 to 2½ hours period was agreed at about 240 only; and
6. the distance she had walked between the aisles in order to check the goods that morning was within a reasonable range as each aisle was about the length of the court room at about 17.5 metres only.

*Allegations against the defendant*

1. The plaintiff has pleaded in the SoC and/or maintained at the trial the following allegations against the defendant:-
2. allowed the plaintiff to work in a system where she was required to make use of the internal staircase at the time of the Accident when it was unsafe to do so;
3. failed to ensure that the plaintiff was able to perform her duty without time pressure;
4. failed to conduct a risk assessment to inspect the work undertaken by the plaintiff;
5. failed to provide the plaintiff with any instruction, warning or supervision; and
6. failed to provide any warning signs at the staircase.

*The Findings*

*(A) Alleged tiredness and fatigue*

1. Eventhough this matter has not been pleaded in the SoC and therefore strictly speaking does not need to be entertained, I shall deal with it first as it consisted the main plank of the plaintiff’s case during the trial and the plaintiff’s submission that allegedly this is linked to the “working under time pressure” issue.
2. I have no hesitation to reject the plaintiff’s case that the Accident was caused by the alleged tiredness and fatigue of the plaintiff on the day of the Accident. In this regard, I agree with the defendant’s counsel submissions that:-
3. The plaintiff had been undertaking similar duties since 10 December 2013 after her colleague on 4/F left the company;
4. It had only been 20 days since the plaintiff was required to work between 1/F and 4/F (excluding 3/F which another colleague of hers was solely responsible for) until the Accident;
5. During those 20 days, she had had breaks and holidays. There was nothing to suggest that the plaintiff was deprived of sufficient rest and sleep after work each day;
6. Most importantly, the plaintiff had sufficient rest before the Accident:-
   1. she had a day off before the day of the Accident, ie on Sunday, 29 December 2013;
   2. she only had to work half day on the previous Saturday, ie on Saturday, 28 December 2013;
   3. there was another public holiday on the Wednesday of the previous week, ie on Christmas day 25 December 2013;
   4. the plaintiff agreed that she was well rested prior to starting work on Monday, 30 December 2013;
   5. the plaintiff was not standing or walking for the whole period of time between 8:00 and 10:30 am on the day of the Accident;
   6. the plaintiff managed to sit down on her desk on 4/F for about 20 minutes to do her paper work prior to the Accident;
   7. the plaintiff had also spent time in operating the forklift which required her to be in a sitting position;
   8. the plaintiff had also spent time in explaining to her new colleague on 4/F about the duties that he was going to takeover;
   9. the plaintiff had also taken the passenger lift to travel to different floors on a few occasions during that morning; and
   10. the walking between the aisles on different floors for checking the stock and processed products did not require strenuous activities which might caused her physical fatigue.
7. In view of the above, even taking the plaintiff’s case at its highest, I find the climbing and descending of the stairs in the morning of the Accident was sporadic only and they were well spread out over a period of 2 to 2½ hours.
8. Further, I find the walking and standing along the aisles for checking of stocks were for short periods only and would not cause undue tiredness or fatigue. For example, she was able to stand for a few minutes and then walked to another aisle for a few minutes while checking the stock. This process would last for about 20 minutes on each occasion before she would move to another floor to repeat the same procedure again. Therefore, in my judgment, there had been reasonable rotation of activities for the plaintiff for her not to become too tired or fatigue during that morning.
9. As to her level of tiredness, I agree with Mr Gidwani that the evidence does not support the plaintiff’s case that it was so serious that the plaintiff could not function normally:-
10. the plaintiff in her evidence described her level of fatigue as “somewhat tired” (「有啲疲勞」) or “little bit tired” (「有些勞累」). It was agreed by the plaintiff under cross-examination that both descriptions refer only to a slight level of tiredness and not anything substantial or extraordinary (「唔係極度疲勞」);
11. the plaintiff also accepts that she did not feel her leg had been weakened during that morning prior to the Accident and she only felt she was “a little bit tired” at the time.
12. In the aforestated circumstances, I find the plaintiff has failed to establish that there was a continuous episode of walking for long distance or standing for long period of time or walking the stairs on too many occasions within a concentrated period of time to make the plaintiff become tired or fatigue which had in turn caused the Accident.

*(B) Working under time pressure*

1. As a matter of evidence, I find the tasks required of the plaintiff during the morning of the Accident were within reasonable bounds for a warehouse keeper of her age and experience. There is nothing to suggest that the plaintiff, who was of good health and physical condition at the time, was not able to carry out such tasks within her capacity. Even though the Warehouse was admittedly a very busy work place and the workers were under constant time pressure to send out the processed rice in good time to the defendant’s customers each morning, in my view, there was nothing to suggest that the plaintiff or her co-workers were under such time pressure that she was required to run or rush down the stairs in order to fulfil her duties. In my opinion, the tasks required of the plaintiff that morning would not have caused a reasonable warehouse worker to succumb to excessive tiredness or fatigue. In my judgment, it would not be reasonably foreseeable for the defendant to think that it was unsafe for her to take the stairs on the day of the Accident.
2. In *Law Shu Ming v Tung Wah Group Hospitals*, unrep (HCPI 630/2008, 26 August 2009), the plaintiff sustained injuries to his right middle finger and back when he was disposing of a plastic bag of rubbish in a cardboard box as a chef (§1). The plaintiff pleaded that the negligence of the defendant employer included a failure to provide sufficient manpower and provide him with a regular rest day (§14). In that case, at the time of the accident, the plaintiff had worked for 6 hours (§§5,8, 31). The court found:-

“34. In any event, there was no evidence to suggest that the plaintiff's accident was caused or contributed to by his rushing to get the task of disposing of the rubbish completed by any particular time.”

1. Likewise, in our case, there was no evidence to suggest that the plaintiff had to go to 2/F by any particular time. Nor was there any penalty for failure to arrive 2/F fast enough. Furthermore, walking stairs was a straightforward and uncomplicated task especially when the plaintiff was not carrying anything in her hands and was able to hold onto the handrails at the time of the Accident. Having been working in the Warehouse since April 2013, the plaintiff admitted that she was familiar with the working environment. Additionally, as submitted, the plaintiff had only worked for about 2 to 2½ hours which was less that the 6 hours in *Law Shu Ming, supra.*
2. In her evidence, the plaintiff alleged that while she was working on 4/F, she was suddenly called by another colleague on her walkie-talkie (which she described in a local slang as 「哎咪」(literally meaning “calling on the loudspeaker”)) asking her to go down to 2/F. However, she admitted that nobody had asked her to “hurry up” or “go down to 2/F quickly” (「快啲落去」) on the walkie-talkie. Under cross-examination, the plaintiff for the first time explained that the reason why she had to walk down the stairs quickly was because of a missing “delivery note” (「出貨紙」) that she had left on 2/F which would affect the whole process of sending out the goods from the Warehouse (「出貨」). When she was further pressed upon this point, the plaintiff tried to explain that she needed the paper to be brought from 2/F to G/F in order to enable her colleagues on G/F to assign inventory on the lorries. However, the plaintiff went on to say that in the process of “sending out goods” (「出貨」), any delay might lead to the customers complaining to the company. Therefore, there was such an urgency to respond to the walkie-talkie call.
3. I reject the plaintiff’s explanations as given above. First, not only such allegations had never been mentioned in the plaintiff’s pleadings and/or witness statement nor were they mentioned in any of the documents in the trial bundle, they were only mentioned for the first time during cross-examination. Second, I do not regard the call on the walkie-talkie was so urgent that the plaintiff would be put under time pressure to rush down the stairs in order to get the paper. Third, as stated by DW1 Mr Lee, the plaintiff’s immediate supervisor, the working atmosphere in the Warehouse would be particular tense between 7:30 and 9:00 am each morning because it was important to send out the goods in time to the defendant’s customers. This is particularly so during the 2 or 3 weeks before the Chinese New Year. But the Accident happened well before the Chinese New Year and at 10:00 to 10:30 am which was after the morning peak hours. Thus, I cannot see the urgency at all.
4. In my view, there is no evidence to suggest that the plaintiff was under such great time pressure as to require her to rush down the staircase without regard to her own safety.

*(C) Lack of risk assessment*

1. In my judgment, the lack of risk assessment is not a cause to the Accident in our present case as a risk assessment, even if carried out, could not have prevented the plaintiff from stepping into the void if she had not paid attention to her own steps. In my view, walking up and down the stairs is a normal day to day human activity which does not require any special risk assessment. There is nothing to suggest that the staircase in question was in any danger or special needs which would require such an assessment. In any event, Mr Fung for the plaintiff was not able to point to any decided authorities which supports such proposition.
2. I would therefore reject such an argument.

*(D) Lack of instruction and warning*

1. The same argument applies to the allegation of lack of instruction and warning.
2. As said, walking down a flight of stairs is a simple day to day task. It is only natural and reasonable that the defendant should leave it its employees including the plaintiff of how to get on with it. There was no need for any instruction or warning particularly when the staircase was properly constructed, well lit and well maintained, with no slippery substance like oil or water.

*(E) Lack of supervision*

1. Contrary to what has been alleged by the plaintiff in §6(A)(f) of the SoC, there is in my view little need for supervision in the circumstances of this case. In *Law Shu Ming, supra,* Recorder Joseph Fok SC (as the PJ then was) commented on the task of disposing of a bag of rubbish:-

‘ “40. This was not a task, in my view, which required supervision. As Lord Oaksey observed in *Winter v Cardiff Rural District Council* [1950] 1 All ER 819 (at §§822-823):-

“In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that an employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workmen on the spot.” ’

1. In my opinion, walking down a staircase is a simple day to day activity which needs no supervision on the part of the employer.

*(F) Actual cause of the Accident*

1. In her evidence, the plaintiff admitted that when she was walking down the stairs, her mind was pre-occupied with a missing piece of “delivery note” (「出貨紙」) which she had placed on the desk of her colleague on 2/F earlier. She further admitted under cross-examination that she did not pay full attention while descending the stairs “because her mind was occupied by her work”. She also admitted that her thoughts were occupied by how she would be able to deal with the matter while the paper was missing. While I respect the strong sense of responsibility of the plaintiff towards her job, it is quite clear to me that her mind was distracted by the task she was performing at the time. She must have missed her step while walking down the stairs when her mind was occupied by something else.
2. I therefore conclude that the most probable cause of the Accident was due to the fact that the plaintiff was not paying attention while she was going down the stairs. In my view, it was not caused by any breach of duty or act of negligence on the part of the defendant. Like any employer, the standard of care to be expected of the defendant is one based on reasonableness only. In my judgment, the plaintiff has failed to establish that the defendant had been in breach of its duty of care or any statutory duty owed towards her in this case.
3. Perhaps the most revealing piece of evidence which throws light on the actual cause of the Accident comes from the signed statement by the plaintiff to the loss adjusters dated 15 September 2014.
4. During the interview, she was asked the following question and answered in this way:-

“問(Q): 你認為意外可以如何預防？(How do you think the accident could have been prevented?)

答(A): 自己慢啲上落，不要太急 (I myself walk up and down the stairs slowly, do not be too rushed.)”

1. Thus, as much sympathy as I have for the plaintiff who was a hard working employee and well respected colleague, I have to find that the Accident was entirely caused by her own carelessness. Further, the issue of contribution negligence does not arise in this case as I find she is 100% to blame for causing the Accident.
2. In the aforestated premises, I find the plaintiff has failed to prove her case against the defendant both under negligence and breach of statutory duty. I therefore would dismiss the plaintiff’s claim against the defendant.

*QUANTUM*

1. For the sake of completeness and just in case I am wrong on the issue of liability, I shall briefly deal with the issue of quantum below.

*The Injuries*

1. The plaintiff has failed to report the Accident on the day of its occurrence. The defendant was only made aware of the Accident a few days later, ie on about 2 or 3 January 2014. On the day of the Accident, the plaintiff managed to complete her shift despite the injuries allegedly sustained. She also managed to work another 12 hours shift on the next day. According to the plaintiff, she only sought medical assistance for the first time on 2 January 2014 from a traditional Chinese medical practitioner. On the second day after the Accident, the plaintiff had a day off from work, ie on 1 January 2014 which was a public holiday. Thereafter, apparently the plaintiff went to Japan for a planned vacation with her family. However, the plaintiff claims that she was only able to walk for very short distance during that holiday and spent most of time at or around the hotel.
2. The plaintiff first attended the Accident and Emergency Department (“A&E”) of Tuen Mun Hospital (“TMH”) on 8 February 2014, which was over 1 month after the Accident. The medical examination carried out by the doctor at the A&E revealed only tenderness over the medial side of the plaintiff’s left knee. There was no knee effusion or fracture. In the RSD dated 20 October 2016, which was prepared almost 3 years after the Accident, the plaintiff still complained of the following:-

(a) intermittent left knee pain;

(b) left knee pain aggravated by slope/stairs walking or walking for more than 30 minutes;

(c) sporadic pain which occurred 3-4 times daily;

(d) the need to use analgesic for pain control; and

(e) left knee stiffness and inability to squat.

1. The plaintiff maintained the same complaints at the time of trial. However, I agree with the defendant that the plaintiff’s initial complaints were not supported by any objective clinical findings. First, the alleged injury sustained by plaintiff in the Accident was not a traumatic one. There was no direct contusion to her knee. The mechanism of the injury was a simple stepping into the void, slipped, losing her balance and twisted her muscles. Both the X-ray and MRI of her left knee showed no fracture or tearing. The diagnosis was one of soft tissue injury only. There was no significant structural damage to the ligament or other structure to her knee.
2. In the joint medical report dated 26 September 2016 by Dr Fu Wai Kee (for the plaintiff) and Dr Ho Ching Lun Henry (for the defendant), (“the Joint Report”), it has been reported that by the time of the examination by the experts in August 2016, the plaintiff was able to walk unaided slowly; could stand on one leg alone eventhough it was unstable on the left side; could not perform heel walking on both sides but could perform tip toe walking on both sides; and could perform a half squat.
3. The examination carried out by the experts revealed that there was no scarring, no swelling or ligament laxity on her left knee. Both limbs’ length were equal. There was no muscle wasting and power of her knees was said to be normal. There was a slight reduction of the range of movement on her knee but no effect on the extension on both knees. X-ray taken by the expert at the time of examination showed both knees with no bony lesion and the alignment was said to be satisfactory. The MRI of the left knee carried out on 16 June 2014 showed no definite pathology. Only minimal signal change in the medial meniscus was found which was possibly due to the plaintiff’s mucoid degeneration. However, such degeneration was not related to the Accident. Both experts agreed that the plaintiff’s treatment had been satisfactory and she had reached maximal medical improvement.
4. In view of the plaintiff’s injuries as summarized above, I would have allowed the following awards of damages had she been able to establish liability in this case.

*(i) Pain, suffering and loss of amenities (“PSLA”)*

1. The plaintiff was 48 years old at the time of the Accident. At the time of trial, she has just turned 53.
2. I prefer the opinion of Dr Henry Ho, the defendant’s expert, than that of Dr Fu, the plaintiff’s expert. In my view, Dr Ho findings are more consistent with the diagnosis of soft tissue injury. Further, the mechanism of the Accident is also consistent with mild soft tissue injury without any significant structural damage to the knee. What is significant to note here is that the plaintiff was able to continue with her work both on the day of the Accident and on the day after. It was only on the day after the Accident that she needed to seek treatment from a traditional medical practitioner and over a month later that she needed to seek help from the A&E at TMH. Therefore, any injury she might have sustained in the Accident could not in my view have been serious. Further, the plaintiff could return to her original work as a warehouse keeper and was able to discharge the normal duties assigned to her. Therefore, the impact of the Accident on her working ability and efficiency should in my opinion be very limited only.
3. Mr Fung for the plaintiff submits that the appropriate PSLA in this case should be in the sum of $200,000. He relies on the following cases:-

(a) *Mahmood Tariq v Kinway Engineering Ltd & Another*, unrep (HCPI 149 of 2006; 17 May 2007);

(b) *Leung Bon Kau v Lau Kong*, unrep (HCPI 1455 of 2000; 26 September 2003);

(c) *Ko Kam Wai v Sze Hak Fung & Anor*, unrep (HCPI 292 of 2005; 11 July 2006);

(d) *Yip Leung Hoi v Tin Wo Engineering Co Ltd & Others*, unrep (HCPI 1026 of 2004; 29 March 2007);

(e) *Cheung Yuen Ying v Integrated Display Technology Ltd*, unrep (DCPI 2109 of 2013; 16 November 2015);

(f) *Chan Chun Fat v Fortress Glory Engineering Limited*, unrep (HCPI 832 of 2013; 7 July 2014); and

(g) *Leung Siu Sum v Swire Beverages Limited trading as Sire Coca-Cola HK*, unrep (DCPI 1069 of 2011; 8 January 2014).

1. Mr Gidwani for the defendant, on the other hand, submits that an appropriate PSLA award in this case should be no more than $100,000 only. He relies on the following decided cases:-

(a) *Chan Sau Lan v Chesterton Petty Ltd*, unrep (HCPI 1123/2002; 3 November 2004);

(b) *Wong Yau Sui v Moral Accord Limited & Anor* [2017] 2 HKLRD 322;

(c) *Chan Chun Fat v Fortress Glory Engineering*, unrep (HCPI 832/2013; 7 July 2014);

(d) *Subba Alvin also known as Gurung Yadap Chandra v Houng Kee (Asia) Limited & Ors*, unrep (HCPI 154/2010; 16 July 2014); and

(e) *Leung Siu Sum v Swire Beverages Limited t/a Swire Coca-Cola HK*, unrep (DCPI 1069/2011; 8 January 2014.

1. Having considered the medical evidence in this case and in particular the contents of the Joint Report, I am of the opinion that her injuries are not as serious as those she claims to be. In my judgment, they are more akin to the injuries suffered by those victims who suffered from soft tissue injuries as referred to by the defendant’s counsel, particularly in the cases of *Wong Yau Sui*, *Chan Chun Fat* and *Leung Siu Sum, supra*.
2. In my judgment, an appropriate PSLA award in this case should be in the sum of $100,000.

*(ii) Pre-trial loss of earnings & loss of MPF*

1. The plaintiff pleaded that her monthly income prior to the Accident was at $12,360. In fact, her salary payment record reveals that her average monthly earning should be at $11,638.50. There is the same figure reported under the Form 2. I shall therefore adopt this at her average monthly income at the time of the Accident.
2. The plaintiff was reportedly granted sick leave intermittently from 2 January 2014 to 22 December 2015, ie for a total of 448 days.
3. It is trite that sick leave certificates issued by treating doctors are not concussive evidence: see *Tam Fu Yip Fip v Sincere Engineering and Trading Co Ltd* [2008] 5 HKLRD 210 at §18.
4. In this case, I prefer the opinion of Dr Ho as stated in the Joint Report and consider that an appropriate sick leave period in this case should be no more than 3 months, having considered the nature of the injury and the objective clinical evidence.
5. Hence, the loss of pre-trial earnings I would find for the plaintiff had liability been established would be in the sum of $34,915.50 (11,638.50 x 3). There will be MPF of 5% at $1,746 for this sum.

*(iii) Future loss of earnings*

1. I accept the opinion of Dr Ho that the plaintiff is capable of returning to her per-accident work after 3 months of sick leave. Therefore, she would not be entitled to any future loss of earnings.

*(iv) Loss of earning capacity*

1. According to the opinion of Dr Ho, the plaintiff can go back to her original work as warehouse keeper and the impact of the Accident on her working ability and efficiency should be very limited. I respectfully would agree with Dr Ho’s opinion.
2. In any way, the plaintiff has not adduced any evidence to show that the current employment which she has found since the Accident does not suit her present health condition and that she may run a risk of losing her present employment due to the injury sustained in the Accident. As such, I do not consider that the plaintiff will be entitled to any damages for loss of earning capacity resulting from the Accident in this case.

*(v) Special damages*

1. In the RSD, the plaintiff claims a total special damages of $44,458. This has been revised to sum of $47,458 in the plaintiff’s counsel opening submission.
2. What the plaintiff has not taken into account in the claim of special damages is the fact that she had allegedly sprained her left knee again on 20 January 2015. It clearly would amount to a new injury which was unrelated to the Accident. The defendant should not be liable for any medical expenditure incurred as result of the second injury to her knee.
3. In view of the medical receipt produced, I would have awarded a sum of $29,325 as medical expenses in this case. For travelling expenses, I would have awarded a sum of $2,000 only.
4. Hence, the total special damages which I would have awarded in this case would be at $31,325.

*(iv) Summary of calculations on Quantum*

1. Based on the above, the damages that I would have awarded to the plaintiff had liability been established will be as follows:-

(i) PSLA $100,000.00

(ii) Pre-trial loss of earnings $34,915.50

(iii) Loss of MPF $1,746.00

(iv) Future loss of earnings Nil

(v) Loss of earnings capacity Nil

(vi) Special damages $31,325

Total: $167,986.50

Less:

EC payment received $204,905.21

Net total: ($36,918.71)

1. As a plaintiff had already received employees’ compensation from the defendant in the sum of $204,905.21 resulting from the Accident, even if I were to find liability in her favour, she would not have received any award of damages in the present proceedings.

*CONCLUSION*

1. In conclusion, based on the reasons above, I find the plaintiff has failed to establish liability in this case and her claim herein is dismissed with costs accordingly.
2. I hereby make an order nisi that the plaintiff do pay the defendant’s costs of this action with certificate for counsel, such costs to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations. The above order will become absolute in the absence of any application by the parties within 14 days from the date of handing down this judgment.

( Andrew SY Li )

District Judge

Mr Henry EW Fung, instructed by Alan Wong & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Victor Gidwani, instructed by Deacons, for the defendant