# DCPI 720/2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 720 OF 2004

--------------------

BETWEEN

## CHAN CHI KEE Plaintiff

### and

SECRETARY FOR JUSTICE

(for and on behalf of the DIRECTOR OF

LEISURE & CULTURAL SERVICES) Defendant

--------------------

Coram : Deputy District Judge W. Lam in Court

Dates of Hearing : 8th and 9th August 2005

Date of Handing Down Judgment : 15th August 2005

JUDGMENT

# Background

1. On the 6 July 2003 at about 11:30 a.m. the Plaintiff (“P”) was a visitor at Defendant’s (Leisure and Cultural Services Department “LCSD”) public swimming pool situated at Hammer Hill Road Kowloon. There was an arched footbridge over the pool consisting of 9 steps up and 9 steps down on each side. The whole walkway was lined with artificial turf. P was about to take the first step down the bridge when he slipped and fell over all the steps, landing on his buttocks, and sustaining a fracture to the *os calcis* (heel bone) for which he required surgical pinning. P claims under general negligence and occupiers liability, but the parties have agreed on quantum, and so this trial is only on liability, and if proved then how much if any contributory negligence.

## Evidence

2. P (PW1) testified. After an initial queueing up at the gates he entered the pool itself with his family. At about 11:30 a.m. he decided to walk to the other side of the pool over the footbridge. Most of the pool areas, including the bridge itself and its steps at each end, were covered with green artificial turf which P agreed was normally anti-slipping (Exhibits D1 and D2). He walked onto the bridge then planned to walk down the steps. But when he lifted one foot (which foot he cannot remember) in order to walk onto the first step, the other foot which was still on the bridge surface “stepped on something slippery”, and he fell down all the 9 steps until he found himself sitting by the bottom of the steps about 12 inches from the last step. He felt intense pain on the left foot and hip. He felt and looked at his soles. He found a dark green slippery substance on both soles, which he thought was “similar to moss”. He tried to get up but could not. His wife came over and reported the incident to the lifeguards. He was taken by stretcher and ambulance to the United Christian Hospital, arriving within an hour of the accident. By his request he was transferred to St Teresa’s Hospital for surgery privately. P’s letter to the LCSD dated 21st October 2003, which his wife (PW2) wrote as he dictated, had not mentioned moss or dirt.

3. P’s wife Mdm CHAN testified. She said she saw the dark green substance on P’s left sole and it felt slippery. In her witness statement she mentioned *both* soles. Under cross-examination she agreed that her allegation of LCSD “having carried out a large scale cleaning operation by the time she returned to inspect the scene a few days afterwards”, was mere speculation. She did not take photographs until 3 months after the event because a “friend from yum-cha” advised her to take them. Despite having received 3 telephone calls from a Mr Wong of the LCSD while P was in hospital, PW2 had not mentioned anything to the officer about moss or indeed about dirt of any kind.

4. P’s elder sister (PW4) and her husband (PW3) also testified, both saying they had seen “dark green slippery substance like moss” on P’s left sole, although in PW3’s witness statement he said *both* soles. Both of their statements were not obtained until 2 years after the event, and the wording in the statements regarding the most important issue, i.e. “the dark green slippery substance like moss on both soles”, were almost identical to each other’s and to PW2’s. But more significantly, PW2 PW3 and PW4 all said in court that they were bare feet, yet they did not slip over while walking on the bridge or on the steps when they went over to see P. I do not think PW2 would have walked slowly the first time, nor did PW2 had any reason to walk slowly. Yet she had not experienced anything slippery herself, nor did she almost slip over. Nor did PW3 or PW4 experience anything slippery themselves. When PW3 was asked about his own bare feet he said he did not notice any such substance. There is no proof, not even a photograph, not to mention a biologist’s report, except a bare oral allegation that there was such a substance. Furthermore, there were “many people in the pool that day because it was a day for free admission”, which from DW1 we now know was “full house, being 906 patrons at the time”, yet we have heard of nobody else slipping or falling, or even near slipping, in the way P experienced. We should remember the surface was rough, not smooth. If there had been moss, I do not accept it had grown only in that one small area, and if significant there must have been more people with P’s experience on that day. P’s soles may not have been immaculately clean, but I do not accept P, PW2, PW3 or PW4’s testimonies when they said they found a dark green slippery moss-like substance on P’s soles, still less do I find proved on the balance of probabilities that any such substance on P’s foot or feet, which allegedly had caused him to slip over, had been present on LCSD’s artificial turf.

5. For the defence, DW1 Mr CHAN who was a life-guard at the scene, and DW2 Mr TONG who was the Site Manager, both testified that at the time of the accident there was no stagnant pools of water or foreign substances, or any slippery substance such as moss, or any worn or uneven turf patches. DW1 had looked at P’s foot and had seen no dark green moss-like material. I find him honest, as he said he did not look at P’s right foot and he “could not be certain” that there was no such substance on this foot. As to whether any swimmers, especially children, had fallen over before, both DWs admitted that there had been, but said falls did not necessarily mean slippery grounds. For obvious reasons this evidence must be correct. However it is not disputed that the relevant surfaces were wet. In any event this must obviously be the situation, because the premises was a swimming pool.

6. My abovestated negative finding on causation by moss or foreign material makes the issue of adequacy of cleaning irrelevant. However for the sake of completeness I should include DWs’ evidence regarding system of cleaning, i.e:

(1) Daily and constant inspection by lifeguards as they patrol the pools,

(2) Daily checking that cleaning contractor “Johnson” each morning at 06:30 had provided adequate numbers of cleaning staff, which were no fewer than 10 for each shift during the summer months,

(3) Daily checking of cleanliness including Johnsons’ diligence by LCSD staff including DW2 himself of offices, change rooms, and all sites including the bridge and steps in question, for any rubbish or foreign materials,

(4) Daily hosing-down by LCSD staff themselves during all “closed times” in-between sessions,

(5) Daily hosing down by staff of contractor Johnson,

(6) Weekly “major cleaning” including the use of high pressure jets and disinfectants. I find the system impressive. Furthermore, the time of this incident was immediately post-SARS, and I accept DWs’ evidence that the Government as well as LCSD staff themselves, were especially vigilant and diligent regarding cleanliness and general hygiene in public pools, and

(7) If any inadequacy was seen, the Government would issue a warning letter to the cleaning contractor.

7. While P suggests mucus or other slippery substances could have been present which was not readily visible, it is not the law that the occupier LCSD must inspect every inch of the turf every 5 minutes. Even then it would be impossible to ensure the absence of slippery materials in such a large pool area patronised by so many people at the same time. I find the system of cleaning sufficient.

Findings

8. The parties cited the law in *CHEUNG Wai-mei* CACV 38/2000 which followed the principle stated in *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 at 815. Plaintiffs have the burden to prove the normal elements of negligence (and/or of occupiers liability where applicable), but the duty upon the occupiers of premises is not an absolute one. I should briefly state that LCSD criticises P for not having detailed his complaint about a dark green slippery substance, or moss, or indeed water, when he wrote his letter to LCSD on the 21st October 2003. But I accept that P was not a lawyer, and whether his use of the wording “very slippery artificial turf (一幅十分滑的人造草地毯)” included anything making the turf slippery, is mere semantics. For example, “a floor which has been made slippery by a foreign material” is no different from “a slippery floor”. I do not find that in this trial P has strayed outside his complaint in his letter to LCSD, or outside his case as pleaded: see for example under Particulars of Negligence at paragraph 4(c).

9. Despite the difference in evidence between the parties regarding the location where P came to rest, which I find to be a normal variation of memory among witnesses, I have no difficulty finding that P did sustain the fall as he was attempting to descend the steps, and that it was due to slipping. If he had merely tumbled down, I would have expected his upper limbs including his hands or his upper torso including the shoulders or even his head to have sustained some impact injuries. As to the issue of moss or foreign material on P’s feet I have already analysed the evidence above. I find that, if P had slipped due to any foreign matter under his feet, it has not been proved that this matter had resulted from LCSD’s omission to implement a reasonable system of cleaning the premises. However this is not the end of the matter, because the absence of moss or foreign materials is not the only issue.

10. What P also said was that the surface of the bridge “felt slightly slippery” a few paces before he reached the descending steps. I accept this part of P’s evidence to represent the truth. As the scene was patronised by swimmers and the bridge was over a swimming pool, I find that the relevant surface was indeed more slippery than usual because of the presence of water. I find that the surface of the bridge, especially the descending side, was more dangerous to visitors than normal because of the slope downwards. This, together with P’s momentary inattention, had caused his fall. On the whole of the evidence it is clearly foreseeable that somebody might slip and fall, and so there should have been warning signs, but I have heard no evidence of such signs in the vicinity especially on the bridge itself. I therefore find the defendant LCSD liable under common law negligence as well as under the Occupiers Liability Ordinance.

11. I come now to the issue of contributory negligence. The evidence shows:

(1) P first detected a degree of slipperiness about 2.5 paces before he came to the first descending step,

(2) P nevertheless did not walk a short distance to the side, either side, where there were handrails so that he could make use of same,

(3) P did not examine what was slippery, and if there was foreign substance on his soles he should have stopped and cleaned off the same, or at least slow to a snail’s pace if he decided to walk on,

(4) Despite having felt slipperiness while on the surface of the bridge, P did not pay attention on where he was walking as he continued to walk. On his own evidence P said he was “looking at other people playing” at a time when he was approaching a downhill path with steep steps ahead.

12. The fact that despite so many patrons were on site, and that even P’s own family members did not slip and fall while walking the same bridge and steps, I find that P had been careless about his own safety, especially when “at 2 or 3 paces from the steps” he had already felt a degree of slipperiness. It must have been obvious to him that there was at least water on the artificial turf. What he should have done was to move to the side and hold onto the handrail, or stop altogether and/or turn back, or if he wished to continue walking then reduce his speed to a snail’s pace. But he has done none of the above. In all the circumstances I find contributory negligence at 75%.

Quantum

13. The parties have agreed on quantum in the sum of $230,000 inclusive of interest. As contributory negligence has been adjudged at 75%, P is entitled to an award of $57,500 inclusive of interest.

Summary

14. There will be judgment in favour of the Plaintiff for $57,500 inclusive of interest. Costs to the Plaintiff *nisi* to be taxed if not agreed.

( William Lam )

Deputy District Judge

Mr. Peter WONG instructed by Messrs. Rita Law & Co. for the Plaintiff.

Mr. C.K. WONG instructed by Messrs. W.H. Chik for the Defendant.