# DCPI 1336/2019

[2022] HKDC 315

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1336 OF 2019

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BETWEEN

SO SIU LING Plaintiff

and

SWIRE PROPERTIES MANAGEMENT LIMITED Defendant

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Before: Deputy District Judge Jonathan Wong in Court (Open to public)

Dates of Hearing: 14 to 16 December 2021

Date of Judgment: 25 April 2022

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JUDGMENT

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1. ***Introduction***
   1. At the material time, the plaintiff was employed by the defendant as a building attendant at Cityplaza, 18 Taikoo Shing Road, Taikoo Shing, Hong Kong.
   2. Cityplaza is one of the largest shopping malls in Hong Kong. The Defendant was and still is the property manager of Cityplaza.
   3. On 2 November 2016 at around 2:30 pm, the plaintiff, whilst on duty, was walking along the corridor on the 1st South Basement Floor of Cityplaza (“**Level B1 South**”). She slipped and sustained injuries (“**Accident**”).
   4. In these proceedings, the plaintiff seeks to recover damages arising from the Accident. Her claim is disputed by the defendant on both liability and *quantum*.
   5. At the trial, the plaintiff was represented by Mr Peter Wong and the defendant by Mr Gary Chung and Mr Jethro Pak, all of counsel.
   6. In the course of the trial, Mr Wong confirmed that the plaintiff was pursuing a case which was narrower than her pleaded case. For example, Mr Wong confirmed that he would no longer rely on the doctrine of *res ipsa loquitur* and a number of the particulars of negligence advanced.
   7. The following issues may be distilled from the positions advocated by the parties in their closing submissions.
   8. First, the parties do not agree on a number of factual matters in relation to the Accident, in particular as to what substance was on the floor which caused the plaintiff to slip and fall.
   9. Secondly, on liability, whilst both parties rely on *Ward v Tesco Stores Ltd* [1976] 1 WLR 810, they have a different reading of the case, in particular on the elements which the plaintiff is initially required to establish before the evidential burden shifts to the defendant to show that the Accident happened without negligence on its part.
   10. Thirdly, Mr Wong complained that the cleaning system in place was not “rigourous” enough, in that there was no proper mechanism for the defendant to assess or monitor the performance of its cleaning contractor, ISS Facilities Services Limited (“**ISS**”). The foregoing is disputed by the defendant.
   11. Fourthly, there is an issue on whether the plaintiff herself was negligent. The main disputes between the parties are (1) whether the plaintiff was, contrary to the instructions given by the defendant to its employees, using her mobile phone when she slipped and (2) whether the plaintiff was rushed by her superior to complete the task at hand.
   12. Finally, the *quantum* of the plaintiff’s claim is disputed. In particular, it is the defendant’s case that the plaintiff had exaggerated the extent of her injuries and residual complaints.
2. ***The evidence***
   1. In terms of factual evidence, the plaintiff herself gave evidence and the defendant called Mr Lau Wing Tat (“**Lau**”), Ms Poon Siu Ying (潘小英) (“**Poon**”) and Mr Leung Cheuk Hang (梁焯恒) (“**Leung**”). Lau, Poon and Leung were at the material time employees of the defendant and respectively a building manager, a building attendant and a building supervisor.
   2. In terms of orthopaedic expert evidence, the plaintiff and the defendant respectively engaged Dr Fu Wai Kee (“**Dr Fu**”) and Dr Lee Po Chin (“**Dr Lee**”). Their joint report dated 27 July 2018 (“**Joint Report**”) was admitted into evidence and the parties confirmed that there was no need for the experts attend the trial for cross-examination.
   3. I propose to deal with the evidence and make the relevant factual findings by reference to a number of subheadings.
3. *The engagement of plaintiff by the defendant*
   1. On 16 September 2013, the plaintiff was employed by the defendant as a building attendant.
   2. The plaintiff confirmed in evidence that she was provided by the defendant with a written safety guide which contained instructions to avoid slipping and tripping and that there were briefing sessions before the start of a working shift. Although the plaintiff did not agree that the anti-slipping or anti-tripping measures were discussed at each and every briefing session, she accepted that they were canvassed once every few months.
   3. The plaintiff further agreed in evidence that the defendant had issued a notice on 13 June 2016 reminding employees that they should not play with (把玩) their mobile phones whilst on duty (“**Notice**”).
   4. Mr Wong confirmed in opening that the plaintiff would not pursue the pleaded allegation that the defendant had failed to give proper or any supervision to the plaintiff.[[1]](#footnote-1)
4. *The engagement of ISS by the defendant*
   1. As explained by Lau, ISS was engaged by the defendant to provide cleaning service at Cityplaza through a tender process. On 27 August 2014 and 6 November 2014, ISS and the defendant respectively signed a written contract for the provision of cleaning service at Cityplaza for a term of two years (“**ISS Contract**”). Upon expiry, it was renewed on a monthly basis until sometime in 2020. It appears that the ISS Contract commenced before the defendant’s signature, as it was Lau’s evidence that the Accident took place after the expiry of the two-year term. Lau admitted that the ISS Contract was not renewed in 2020 because the defendant was not satisfied with the performance of ISS in 2019. Mr Wong fairly did not seek to link the Accident which happened in 2016 with the defendant’s decision to not renew the ISS Contract in 2020.
   2. Although Lau was not personally involved in the tender process (he was stationed at Pacific Place, another Swire property, until December 2015 and was thereafter transferred to Cityplaza), he explained that as part of any tender analysis, the defendant would consider the tender price, the size of the tenderer, reference from the defendant’s other properties in its portfolio and the remuneration paid by the tenderer to its employees. Indeed, Lau gave evidence that, according to the defendant’s practice, ISS was selected mainly by reason of its good performance at other portfolio properties and the fact that it was a sizeable company.
   3. The ISS Contract contained detailed provisions and specifications of the service to be provided by ISS under it. For example, under Clause 10.1, ISS was to provide fully trained and skilled cleaning workers and competent managers, supervisors and foremen to perform the overall works. Clause 21 made provisions that ISS must provide proper supervision of its works and attend such site meetings as would be required by the defendant.
   4. Level B1 South is and was at the material time where the loading bays are and were located, in respect of which detailed specifications and schedules were set out at Section 3 of the ISS Contract. Relevantly, in respect of the loading bay, ISS was, *inter alia*, to continuously and on an as required basis “*sweep, wash, clean and disinfect loading dock areas including platforms, parking bays, garbage compactor tank and adjoining area and/or garbage rooms, garbage tanks, etc.*” Further, ISS was required to “*provide one attendant at each of the loading bay areas / garbage rooms, to maintain a clean, tidy and sanitary condition… and to handle the dumping of refuse into garbage compactor.*”
   5. Given the matters canvassed in this subsection, it is unsurprising that, Mr Wong did not pursue the allegation that the defendant “*had failed to select with due care for the appointment of cleaning service provider*”.[[2]](#footnote-2)
5. *The cleaning system and supervision by the defendant*
   1. On the day of the Accident, as required under the ISS Contract and according to the duty roster of ISS, ISS had deployed eight supervisory staff (ranging from assistant manager to assistant foreman) at Cityplaza for the dayshift, and a dedicated staff, a Madam Lam Sang Lai Kwan (林生麗君) (“**Cleaner Lam**”) was stationed at Level B1 South.
   2. A CCTV footage of the location of the Accident was adduced into evidence (“**Footage**”). Unfortunately, the Footage is only able to capture the plaintiff falling (at the left bottom corner of the screen) but, due to the angle, does not capture the relevant floor area. The Footage also is not continuous but only captures various intervals from 14:02:06 hrs to 14:44:01 hrs.
   3. However, what appears clear from the Footage is that Cleaner Lam used a wet mop to clean the floor after pulling a garbage trolley (covered with a lid) along the corridor. It is true that the Footage only shows Cleaner Lam mopping a small area of the floor (ie dragging the wet mop whilst walking and mopping only vicinity of her walking path), it is plain that the area of the Accident was generally clean and with good lighting.
   4. In her *viva voce* evidence, the plaintiff said that she would only on occasions see lunch boxes inside the rubbish bins on Level B1 South and some sauce or gravy would be on the floor around the rubbish bins. On the left bottom corner of the screen, the Footage shows a silver cylindrical object which resembles a rubbish bin. The plaintiff’s witness statement does not deal with the usual cleanliness of (or the lack thereof) the location of the Accident. Even accepting the plaintiff’s evidence that there were sporadic occasions that sauce or gravy was spilled out from lunch boxes being discarded into the rubbish bin, that, without more, does not mean the performance of ISS (via Cleaner Lam) was in any way wanting. Much depends on how long the debris remained unattended, as ISS could not be expected to clear away any debris as soon as they appeared.
   5. It was Poon’s evidence that on those occasions where she had to go to Level B1 South (which was about three times a year) she did not see any debris on the floor. Poon’s evidence was not challenged by Mr Wong.
   6. There is no or no sufficient evidence to contradict the cleanliness of the location of the Accident which is shown in the Footage. The evidence also demonstrates that what is shown in the Footage is representative of the cleanliness generally at all material times and I so find.
   7. The supervision of the cleaning works was multi-layered.
   8. First, as required by the ISS Contract, ISS would itself supervise its own works (§2.10 above).
   9. Secondly, as accepted by the plaintiff, as part of her job duties as a building attendant, she was instructed to pay attention to the cleanliness of the floor, irrespective of whether she was on patrol duty or not.
   10. Moreover, the plaintiff accepted that, as part of her job duties as a building attendant, whether she was on patrol duty or not, should she find any rubbish, debris or stains on the floor, her responsive measures were of three tiers: (1) if the concerned waste was of a small size or area, she should dispose of or wipe off the same, (2) if the waste was of a considerable size or area such that she could not handle it by herself, she should find a cleaning worker to handle the same and (3) were she unable to find a cleaner worker, she should contact the control room to summon a cleaning worker to the location and, in the meantime, station at the concerned area until the waste was disposed of or cleared away (“**Plaintiff’s Job Duties**”)
   11. Leung gave evidence that building attendants were required to carry out patrol three times a day and the plaintiff accepted that such patrol duties would cover the area of the Accident. The plaintiff accepted that such patrolling system was in place but was unsure about the frequency of the patrol duties. Mr Wong complained that the defendant did not disclose the logbook of the patrol duties carried out by the building attendants. Where, as here, the plaintiff herself did not positively suggest that Lau’s evidence was incorrect (and Mr Wong did not put to Leung that his evidence was untruthful), I accept Leung’s evidence that patrolling duties took place once during each of the three shifts by the building attendants.
   12. The failure by the defendant to produce the patrol logbooks of the building attendants was due to an error made in Leung’s evidence. Annexed to Leung’s witness statement are logbooks originally presented as those signed by the building attendants. However, it turned out that they were signed by the security guards. At the material time, the defendant had outsourced the security service to a company called CNT (國民警衛). Leung explained that the external security guards were required to monitor cleanliness. I am not prepared to accept Leung’s evidence that the external security guards were instructed to monitor cleanliness to the same extent as the building attendants. The terms of the agreement between CNT and the defendant have not been disclosed and the plaintiff was never given the opportunity to deal with this issue, as the correction was only made when Leung gave his evidence.
   13. I find as a fact that part of the monitoring system of the cleaning work carried out by ISS was carried out by the building attendants on an ongoing basis irrespective of whether they were on patrol duty, and the area of the Accident was patrolled three times a day during each of the three shifts.
   14. Thirdly, as required by the ISS Contract, monthly site meetings were held between ISS and the defendant. As explained by Lau, which evidence I accept, the performance of ISS was discussed at these site meetings.
6. *The Accident*
   1. The background matters leading to the Accident set out in this paragraph are not in dispute.
7. On the day of the Accident, the plaintiff was told by the control room that the female washroom on the ground floor[[3]](#footnote-3) needed to be cordoned off for repair. She attempted to look for warning signs to put up at the washroom but was unable to locate them. She informed the control room and was instructed by the control room to retrieve the warning signs from the typhoon store situate on Level B1 South.
8. On her way to the typhoon store, she ran into a colleague (“**Colleague**”) and enlisted his assistance.
9. The Footage shows that the plaintiff and the Colleague walked past the location of the Accident at 14:26 hrs on their way to the typhoon store.
10. The Footage shows that the plaintiff fell at 14:28 hrs on her way back from the typhoon store, followed by the Colleague carrying two warning signs.
11. After the Accident, an accident report was compiled at 5:30 pm (“**Accident Report**”) by Leung. The photographs annexed to the Accident Report show some food residue of the approximate size of a palm (without the fingers) on the floor and a rubbish bin at the location of the Accident. The Accident Report stated that the plaintiff stepped on some food residue and lost her balance.
    1. It is the plaintiff’s evidence that when she first walked past the location of the Accident, she did not notice anything on the floor which required her handling, as prescribed by the Plaintiff’s Job Duties.
    2. The plaintiff also said in evidence that at the material time, she was being rushed by the control room and she checked the time on her mobile phone at the time of the Accident. In her *viva voce* evidence, she said for the first time that she had stopped momentarily to check the time and when she fell she was not looking at the mobile phone. She said that after checking the time from a stationery position, she stepped forward and slipped immediately.
    3. The plaintiff did not know what caused her to slip and Mr Chung submitted that the plaintiff was unable to prove that she slipped on the food residue. He made this submission by reference to the fact that it was the plaintiff’s evidence that when she checked the sole of her shoes when she was on the ambulance, the substance was of grey colour whilst the food residue as shown in the photographs was of a flesh-like colour.
    4. It seems to me that there are the following essential areas of dispute:
12. Whether the plaintiff was rushed by the control office?
13. Whether the plaintiff was using her mobile phone at the time of her fall?
14. When did the food residue appear on the floor of the location of the Accident?
15. Whether the plaintiff slipped on the food residue?
    1. Whilst I am prepared to accept that the control room obviously wanted to have the warning signs placed outside the female washroom as soon as possible, I am not satisfied that the plaintiff was under extreme time pressure. When cross-examined, the plaintiff said that she was only rushed by the control room when she was searching for the warning signs. She was unable to recall that she was chased by the control room after meeting up with the Colleague, or even after she and the Colleague had retrieved the warning signs from the typhoon store. The foregoing evidence is not consistent with §3.2 of her witness statement, where she said “當時本人拿着手提電話的原因是觀看電話上的時間，因為管理處不斷催我，所以我才要看時間，而我當時沒有帶手錶。”
    2. Further, the Footage shows, and the plaintiff accepted, when she and the Colleague first walked past the location of the Accident to the typhoon store, they were walking at a leisurely pace and chatting with each other.
    3. The plaintiff further accepted that as the Colleague was walking behind her, she had to wait for him in any event. I am not persuaded that she was under such time pressure that the plaintiff had to check the time on her mobile phone.
    4. I also do not believe the plaintiff’s evidence that she had stopped walking to check the time on her mobile. I have viewed the Footage a number of times and it clearly shows that the plaintiff was holding up her mobile phone (with a bright screen as opposed to be in locked mode) with both hands to her chest level and walking before she fell. The evidence that she had stopped walking to check the time on her mobile phone is inconsistent with her witness statement. At §3.2 of her witness statement, she said that “於是我和同事去南貨台的儲物室去取指示牌，當時行經卸貨台走廊，就向前跣出去，跌倒地上…” The plaintiff in cross-examination said that she had stopped walking before she checked her mobile phone in order to comply with the Notice. I do not believe that such an important piece of evidence, had it been true, would have been omitted from her witness statement.
    5. The plaintiff also accepted that checking the time on her mobile phone would only require the use of one hand (ie holding up the phone and pressing a button).
    6. As such, I am of the view that the plaintiff’s recollection as to what transpired at the time of the Accident is faulty. I find that the plaintiff was walking continuously whilst looking at her mobile phone at the time of the Accident and, more likely than not, that she was not checking the time.
    7. As to the issue of when did the food residue appear on the floor of the location of the Accident, the Footage shows that between 14:03 and 14:04 hrs, Cleaner Lam was dragging a wet mop along the area where the plaintiff fell. It is unlikely that the food residue had already appeared at that time. Cleaner Lam last walked past the location of the Accident (without a mop) at 14:20 hrs.
    8. As stated earlier (§2.28 above), the plaintiff confirmed in cross-examination that when she first walked past the location of the Accident at 14:26 hrs, she did not see anything on the floor which required her handling. It should be pointed out that the Colleague was also a building attendant and it was unlikely that both of them would have missed the food residue if it had by then appeared on the floor.
    9. More likely than not, therefore, the food residue only appeared after the plaintiff and the Colleague first walked past the location of the Accident at 14:26 hrs and I so find.
    10. As shown in the Footage, the plaintiff slipped at 14:28 hrs. I do not accept Mr Chung’s submission that the plaintiff is unable to prove what she slipped on. On the balance of probabilities, it was more likely than not that she slipped on the food residue. The difference in colour between what was noted on the sole of the plaintiff’s shoe (grey) and the food residue on the floor (flesh-like) can be explained by dirt. The Accident Report also shows that it was the defendant’s contemporaneous position that the plaintiff slipped on the food residue shown on the photographs.
16. ***The defendant’s liability***
    1. The plaintiff’s case is based on negligence, breach of employment contract, occupiers liability and breach of the Occupational Safety and Health Ordinance Cap 509.
    2. As I understand Mr Wong, he premised his closing submissions on the approach in *Hsu Li Yun v Incorporated Owners of Yuen Fat Building* [2000] 1 HKLRD 900 at 904G to I,[[4]](#footnote-4) namely that the plaintiff’s causes of action overlap and the ultimate question which is required to be decided is whether the defendant had failed to discharge the common duty of care owed to the plaintiff.
    3. The case pursued in closing by the plaintiff is as follows.
17. It is said that the defendant had no written guideline or checklist for its staff to assess cleanliness and there was no training or instructions on how to assess the cleaner’s work. As such, there was no uniform standard for the defendant’s staff to monitor ISS. It is said that had a more rigourous system with specific quantitative targets for ISS to meet been in place, ISS would have felt more compelled to instruct its cleaners to be attentive to their works or assign better cleaners.[[5]](#footnote-5)
18. ISS had deployed insufficient headcount to properly perform the cleaning works.
    1. The second complaint may be disposed of swiftly. First, this complaint is not pleaded. Secondly, as the complaint is not pleaded, it is not dealt with in evidence by any of the witnesses. As acknowledged by Mr Wong, there was no evidence one way or another as to what was the appropriate headcount.
    2. Before dealing with the plaintiff’s remaining complaint, I should first address the parties’ disagreement on the proper approach to be adopted in determining liability.
    3. Mr Wong submitted that the burden is initially on the plaintiff to show on a balance of probabilities that there had occurred an event which was unusual. If that can be done, the evidential burden then shifts to the defendant to show that the Accident happened without negligence on its part.
    4. Mr Chung disagreed. He said that, before the evidential burden shifts to the defendant, the plaintiff has to additionally show that the defendant knew or ought to have known that the unusual event was not an uncommon occurrence and that the unusual event was more consistent with the fault on the part of the defendant than the absence of fault.
    5. The parties’ difference stem from their different reading of *Ward v Tesco Stores Ltd* [1976] 1 WLR 810. Megaw LJ said at page 815 as follows:-

“It seems to me that the essence of the argument put forward on behalf of the defendants in this appeal is this: never mind whether the defendants had any system of any sort to protect their customers against the risk of slipping on the floor of the supermarket as a result of breakages or spillages - which on their own evidence happened about 10 times a week: even if they had no system of any sort to guard against such a risk to their customers, nevertheless, when an accident happens such as the accident in this case, a lady customer who undoubtedly slips, through no fault of her own, on such a spillage on the floor, she cannot recover against the defendants. And why can she not recover? Because she is unable to prove that the spillage did not take place within a matter of a few seconds before she slipped and fell on it. So that, however perfect a system the defendants had had, it would not have enabled them to prevent this particular accident.

With great respect to those who support that proposition, it appears to me to be contrary to the law as I understand it to be. It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault; and to my mind the judge was right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is, that the defendants knew or should have known that it was a not uncommon occurrence; and that if it should happen, and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves. When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. That, in this case, they wholly failed to do. Really the essence of Mr. Owen's argument - and he did not shrink from it - was: 'Never mind whether we had no system at all: still, as the plaintiff has failed to show that the yoghurt was spilt within a few seconds before the accident, she must fail.' As I have said, in the circumstances of this case, I do not think that the plaintiff, to succeed, had to prove how long it was since the defendants' floor had become slippery.” (emphasis added)

* 1. In my view, contrary to Mr Wong’s submissions, the plaintiff has to show more than the existence of an unusual event. The underlined passage cited in the preceding paragraph plainly states that the plaintiff has to show not only the existence of the unusual event but that it is more consistent with the fault on the part of the defendant than the absence of fault. It is only then the evidential burden shifts to the defendants. On the facts of the *Ward*, the English Court of Appeal agreed with the court below that showing fault on the defendants part involved demonstrating that the defendants knew or should have known that the unusual event was not an uncommon occurrence, and that if not promptly attended to, would have created a serious risk of slip and fall.
  2. I therefore agree with Mr Chung. It is not sufficient for the plaintiff to show merely the occurrence of an unusual event. I am prepared to accept that the existence of food debris on the floor of the location of the Accident was an unusual event. But has the plaintiff additionally shown that the existence of food debris was a not uncommon occurrence which the defendant knew or ought to have known?
  3. I am of the view that the plaintiff has done so. It is common ground that refuse collection point was situate on B1 Level South and it is well-known that Cityplaza has a number of food outlets as tenants. As shown in the Footage, Cleaner Lam was seen to be pulling a covered garbage trolley along the corridor. It seems to me quite plain that refuse, if not handled properly and allowed to be scattered on the floor, would create a risk of slip and fall.
  4. Mr Chung submitted that the location of the Accident was generally clean at the material time and therefore the Plaintiff has failed to prove the presence of refuse on the floor was a not uncommon occurrence that the defendant knew or ought to have known. It seems to me that Mr Chung has conflated the issues. As I have found at §2.18 above, the location of the Accident was generally clean at the material time. However, that only means that there was no material to suggest to the defendant that the cleaning system which was put in place to guard against the risk of slip and fall was failing. Plainly, the defendant was aware of the risk and that was the reason of putting in place a cleaning system.
  5. I am therefore of the view that the evidential burden has shifted to the defendant. I now consider whether there was in place a proper and adequate system and whether the Accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection.
  6. The cleaning system which was in place at the material time has been set out at Sections 2(b) and (c) above. Mr Wong did not contend that the Plaintiff’s Job Duties were either unreasonable or inherently risky.
  7. At set out at § 3.2 above, what Mr Wong did contend was that the cleaning system was not rigorous enough. He made his submission in reliance largely on *Chong Chi Ching v Secretary for Justice & Anor*, DCPI 2733 of 2012, 24 October 2016.
  8. In *Chong Chi Ching*, the plaintiff slipped and fell in a toilet. The cleaning of the toilets of the building was contracted out to a cleaning contractor. The 2nd defendant had a system of supervising the contractor’s work (*Chong Chi Ching* §23). In gist, the system in place was such that the cleaning contractor, Global Cheer Ltd, was contractually required to clean the toilets twice a day and the 2nd defendant’s staff would conduct inspection of the toilets also twice a day. If the 2nd defendant’s staff, during patrol, found that the toilets were wet and slippery, they would contact the cleaning workers of Global Cheer to clean the area and would stay at the area until the arrival of the cleaning workers.
  9. DDJ SP Yip found for the plaintiff. At *Chong Chi Ching* §32, DDJ SP Yip took the view that the important question was whether the system in place was effective to ensure that the cleaners of Global Cheer discharged their work properly on that day. He found at §35 that the 2nd defendant did not have any written guidelines for its staff to assess the cleanliness of the toilets during inspections or any training or instructions in this regard. He therefore concluded, *inter alia*, that the 2nd defendant had failed to institute and enforce a proper system of inspection of the work of the cleaners so as to prevent wet and slippery conditions of the toilet (*Chong Chi Ching* §39).
  10. In the present case, Mr Wong sought to capitalize on Lau’s evidence that the defendant did not devise any standard to evaluate the performance of ISS and drew parallels with *Chong Chi Ching*.
  11. I do not believe the plaintiff can derive much assistance from *Chong Chi Ching*, since, contrary to Mr Wong’s submissions, the facts of the two cases are quite dissimilar. In particular, in that case, the court was invited by the 2nd defendant to draw a number of inferences which DDJ SP Yip declined to do.
  12. It is tolerably trite that:-

1. the mere fact of the occurrence of an accident is not sufficient to give rise to a presumption of negligence on the part of the defendant: *So Wang Chun v Rain Force Ltd* [2008] 3 HKC 197 at §16;
2. as acknowledged by Mr Wong, there is no absolute duty to ensure the floor was clean at all times and what was required was for the defendant to meet the threshold of reasonableness: *So Wang Chun* §62.
   1. As stated by Rogers VP at *Cheung Wai Mei v The Excelsior (Hotel Kong) Ltd t/a The Excelsior*, CACV 38 of 2000, 22 November 2000 §48:-

“… It seems to me that the plaintiff is attempting to put far too high an onus on the defendant not merely to remove any spillages if and when they occur but in terms of stationing people, presumably at all corners of the hotel, at all times, to guard against spillages. The evidence was that there was at least one cleaner on duty that night. In my view that would have been sufficient. Furthermore, in the absence of there being any evidence that anybody, at all, saw any water, moisture or any slippery substance at or near the scene of the accident, it cannot be said that there was a hazard which should have been seen and cleaned before the plaintiff arrived.”

* 1. In my view, the system that was in place to clean the floor of the location of the Accident was reasonable and the Accident, would have happened, on a balance of probabilities, despite the system that was in place.
  2. First, as I have found, the area was generally clean.
  3. Secondly, the plaintiff and Poon gave evidence to the effect that, both in accordance with the Plaintiff’s Job Duties and in their experience, there was no difficulty in locating cleaners from ISS to attend to any debris although they might have to wait for a short duration for ISS cleaners to arrive at the scene.
  4. Thirdly, the plaintiff accepted that she did not see the food residue when she first walked past the location of the Accident. The food debris therefore only appeared during the two minutes between the plaintiff first walked past the location of the Accident to the typhoon store and her return, as I have found (§2.40 above).
  5. Even were I wrong on the conclusion set out in the preceding paragraph, it is shown in the Footage that Cleaner Lam last carried a wet mop at the location where the plaintiff slipped at 14:04 hrs and last walked past it at 14:20 hrs. It is unfortunate that the Footage does not capture the floor area where the plaintiff slipped, but where, as here, the floor which is captured in the Footage was generally clean, it is unlikely that the food residue appeared before 14:20 hrs. In other words, the location of the Accident was at most unattended by ISS cleaners or not inspected by any of the defendant’s staff for eight minutes. It seems to me that Rogers VP’s *dicta* in *Cheung Wai Mei* applies with equal force here (§3.21 above).
  6. Fourthly, as to Mr Wong’s point about the lack of rigour in the defendant’s monitoring and inspection system, I am not sure whether it was necessary or practicable to devise any quantitative targets for ISS to meet. The obligation of ISS at the loading bay was to provide continuous and as-required cleaning by a dedicated staff (§§2.11 and 2.13 above). According to the Footage and the relevant duty roster, this was done. Mr Wong suggested that Cleaner Lam was lackadaisical, in that she was only dragging the mop along her walking path instead of looking around for debris. I do not accept the criticism because how much “active” mopping was required obviously depended on the cleanliness at the time and, as shown in the Footage the area was generally already clean. Lau gave evidence, which I accept, that it was difficult to devise any standards and the defendant only looked at the end result. It cannot be seriously suggested that quantitative targets were required to address the problem of food residue appearing on the floor, when ISS was under a continuous and as-required obligation to keep the floor clean.
  7. Fifthly, I find that the defendant’s system of monitoring and inspection of the works carried out by ISS reasonable and adequate. It appears to be the plaintiff’s case that the food residue was spilled out from lunch boxes discarded into the rubbish bin at the location of the Accident. Such an occurrence must have been an event which could have occurred at any time. Cleaner Lam (or any other clean designated by ISS to station at the loading bay) could not be expected to notice and deal with it at once. The loading bay, as I have found, was inspected by the building attendants at least three times a day (whilst on patrol) and whenever any building attendant (including the plaintiff) would walk past the area (§§2.21 to 2.22 above). The plaintiff accepted in cross-examination that she was paying attention to the floor of the location of the Accident when she first walked past it as it was part of the Plaintiff’s Job Duties and she did not notice any food residue.
  8. For the above reasons, I am of the view that despite the evidential burden having passed to the defendant, the defendant has succeeded in persuading me that there was in place a reasonable and proper inspection and monitoring system and the Accident, would have happened, on a balance of probabilities, despite the system that was in place.
  9. For completeness, Mr Wong in closing relied on Leung’s evidence given in cross-examination that there was no follow up by the defendant with ISS regarding the accident and such spoke volume about the defendant’s haphazard attitude towards its duty to supervise the performance of ISS. With respect, whether there was any following up by the defendant with ISS is not a pleaded issue and, in any event, there is no evidence that the system in place had changed after the Accident, and even if it did, how such hindsight matters are relevant to the present deliberation.
  10. The plaintiff has therefore failed to establish liability against the defendant. I will deal with the issues of contributory negligence and quantum briefly in case I am wrong in the foregoing conclusion.

1. ***Contributory negligence***
   1. The plaintiff’s primary position is that she was not negligent herself. Mr Wong’s position is premised on a finding that the plaintiff was being rushed by the defendant, that she stopped momentarily to look at her mobile phone, and that the purpose of her looking at the mobile phone was to check the time.
   2. I have found against the plaintiff on those factual matters. My factual findings are set out at §2.37 above.
   3. The plaintiff’s alternative position is that the extent of the plaintiff’s own negligence should be in the range of 20 to 40%. Mr Wong referred to a number of cases including *Lau Shui Chun v Leung Tung Ping Metal Factory Limited & Ors*, HCPI 75 of 1997, 7 October 1998 in which the plaintiff was held to be 40% contributorily negligent. In that case, the plaintiff slipped and fell inside a communal toilet of a factory building. He was wearing slippery hard rubber sole slippers well knowing that the condition of the floor was wet and slippery, and was found to be walking normally and not taking any particular precaution.
   4. On the other hand, Mr Chung submitted that the range of contributory negligence on the plaintiff’s part ranged from 25 to 50%. In *So Wang Chun*, the plaintiff was found to be in a hurry and was carrying belongings with his left hand. He was speaking on the phone which he held in his right hand and was walking hurriedly. He failed to see the patch of water which he slipped on. He was held to be 50% contributorily negligent.
   5. *So Wang Chun* is a case concerning a customer in the shopping arcade. In the present case, the plaintiff was specifically trained by the defendant on anti-slipping and tripping measures and she accepted that the Plaintiff’s Job Duties (which were not onerous or inherently risky) required her to guard against the very risk which she complained of in the present case. I accept that unlike *So Wang Chun*, the Footage does not show that the plaintiff was walking at a quick pace. That is counter-balanced by, unlike *So Wang Chun*, the plaintiff here was not a mere customer but was herself part of the monitoring and inspection system. Had I been required to do so, I would have attached 50% contributory negligence to the Plaintiff.
2. ***Quantum***
   1. The difference between the parties’ cases on *quantum* is predominantly due to the defendant’s contention that the plaintiff had exaggerated the extent of her injuries and residual complaints.
   2. The plaintiff was born on 8 December 1969 and was aged 47 at the time of the Accident.
   3. Following the Accident, she was sent to Pamela Youde Nethersole Eastern Hospital (“**PYNEH**”) and physical injury revealed tenderness of left scalp, left shoulder and left hip. Thereafter, she attended a number of different clinics. She was never hospitalized for the injury sustained but underwent physiotherapy and occupational therapy until August 2016. She was granted sick leave from 2 November 2016 to 10 July 2019.
   4. The clinical history of the plaintiff is set out at Joint Report pages 3 to 7 and is a matter of agreement between the two experts.
   5. Her complaints at the time of joint-examination by the experts on 7 June 2018 were as follows.
3. Left hip and thigh pain: the plaintiff complained of intermittent left hip and thigh pain after the Accident. The pain was sporadic but occurred most of the time. She took regular analgesic about two times a day.
4. Left lower limb numbness: the plaintiff complained of left lower limb numbness with decreased sensation from buttock to sole after the Accident. The numbness occurred once per hour and each attack lasted for 15 minutes. She needed stretching to relieve her numbness.
5. Coccygeal pain: the plaintiff complained of continuous coccygeal pain after the Accident. The pain was aggravated by prolonged walking and walking stairs. She could only walk with small steps.
6. Left groin pain: the plaintiff complained of on and off left groin pain mainly during hip movement.
7. Left shoulder pain: the plaintiff complained of continuous left should pain that appeared one year after the Accident. She said it was due to the use of walking stick.
8. Activities of daily living included self-care and hygiene were largely independent. She could go out alone but could only do light household duties. She needed walking stick for outdoor activities.
   1. At the trial, she maintained the bulk of the above complaints except for her shoulder pain.
   2. Both experts agreed that the diagnosis of the plaintiff was soft tissue injury of left shoulder, back, left hip and left thigh and that the plaintiff has reached maximal medical improvement.
   3. The experts, however, did not agree the extent of the injury and residual complaints.
   4. Dr Fu for the plaintiff was of the view that the plaintiff’s condition should be static and her current impairments would persist.
   5. Dr Lee for the defendant was of the view that the soft tissue injuries were minor in nature and subsequent MRI did not show nerve compression which could account for the numbness and there was no documented radiculopathy. He further pointed out that review of the documents showed different complaints at different consultations and may highlight the variability of the plaintiff’s complaints or the fact that some of them were minor and subsided soon. He cited, for example, that the complaint of pain in the coccyx was not documented and was not related to the Accident. He was of the view that the residual pain, if any, should be mild.
   6. Dr Fu believed that the Plaintiff should be marginally able to go back to her original duty but her working efficiency would be significantly reduced. She would have difficulty in long periods of walking and manual lifting, and unless these kinds of duties could be waived, she should shift to sedentary type of duties such as a clerk or an office assistant.
   7. On the other hand, Dr Lee was of the view that the plaintiff should be able to return to her pre-accident job. Whilst there could be potential impaired ability to lift heavy weight, the occasional lifting of objects weighing ten pounds should still be within her capability.
   8. Dr Fu was of the view that the sick leave granted was appropriate without further elaboration.
   9. The Joint Report was dated 27 July 2018. The plaintiff was in fact granted sick leave until 10 July 2019. The plaintiff has therefore not adduced evidence in relation to the appropriateness of the sick leave granted to the plaintiff after the date of the Joint Report.
   10. Dr Lee, on the other hand, pointed to the facts that the plaintiff had finished her physiotherapy and occupational therapy in August 2017, that MRI could not account for her symptoms and that surgery was not indicated. He was therefore of the view that sick leave up to the end of August 2017 should be adequate for her recovery.
   11. In closing, the defendant had prepared of a table showing the variance of the plaintiff’s complaints at different consultations (20 in total). For example, the complaint in relation to the coccyx was only first made on 31 December 2016 and repeated only once on 27 February 2017. When the plaintiff was cross-examined on this issue, she was adamant about what she had told her doctor on a particular occasion, and therefore suggesting that the medical report was not accurate. I have difficulty in accepting that the plaintiff was able to recall precisely what she told the doctors in 2016 and 2017.
   12. The plaintiff was also cross-examined on her use of analgesics as it was remarked in some of the reports “analgesics own stock” meaning that she had not finished all the prescribed analgesics. The plaintiff explained that the prescribed analgesics were not effective to alleviate her pain.
   13. Mr Chung referred me to *Gurung Kamala v Hong Wei Limited*, DCPI 1660 of 2010, 26 March 2012 where DDJ Harold Leong (as he then was) said at §91:-

“Logically, one expects that a patient who is keen to get better and to return to work will return to seek medical help as quickly as possible once he/she realises that the medications are not helping the illness and he/she is not getting better. One might even expect the patient to demand a change of medications (“They don’t work, doctor, give me something stronger!”), more investigations (“It is still painful, I want a scan!”), a referral to a specialist, or even question the doctor whether the diagnosis was correct. If, instead, the patient chooses to wait out the period of sick leave in full before returning to an Accident and Emergency Department, there is at least some suspicion that this consultation is less for seeking an emergency consultation but more for seeking an extension of sick leave.”

* 1. It seems to me that the same observations can be made in the present case.
  2. Taking stock of the factual and expert evidence, I am of the view that the plaintiff has been exaggerating her symptoms and residual complaints and that Dr Lee’s opinion should be preferred. The parties have agreed that the experts were not required to attend the trial for cross-examination, and it is fair to say that many of Dr Lee’s reasons were not addressed by Dr Fu. As stated at *Li Cheuk Lam v Cheung Sun Ta*i, HCPI 1102 of 2015, 13 October 2017 at §35, experts should not accept a plaintiff’s subjective complaints unreservedly in the absence of objective evidence.
  3. I find that the plaintiff had suffered minor soft tissue injuries to her left shoulder, back, left hip and left thigh from which she has made maximum recovery. I do not accept that the plaintiff was suffering from left lower limb numbness or coccygeal pain as a result of the Accident. I further prefer Dr Lee’s opinion that the appropriate sick leave period for the plaintiff was until August 2017 and that the plaintiff could have returned to her pre-accident employment.
  4. I now deal with the various heads of the plaintiff’s claim.

1. *Pain, suffering and loss of amenities*
   1. Mr Wong contended that this head should be assessed at between HK$180,000 to $250,000. On the other hand, Mr Chung argued that an assessment of no more than HK$120,000 should be made.
   2. I have considered the cases cited by the parties. I find *Tsue Lai Kee v Nanyang Commercial Bank Limited* [2021] HKDC 1415 and *Au Yeung Mui Fan v Food Concept Co* [2019] HKDC 1531 to be apt comparators, as both of them are concerned with minor soft tissue injuries from which the plaintiff had made good recovery, as I have found in the present case. In those cases, an assessment of HK$100,000 was made.
   3. In the view, an assessment of HK$120,000 for PSLA in the present case is appropriate.
2. *Pre-trial loss of earnings*
   1. There is no dispute between the parties that the plaintiff was earning HK$16,451 per month prior to the Accident. It is the plaintiff’s evidence that she had effectively not been gainfully employed despite her attempt to look for a job since October 2019.
   2. Mr Wong argued that:-
3. the plaintiff should be entitled to full loss of earnings between the date of the Accident until 2 September 2018, the latter date being three months after the period of sick leave considered by Dr Fu to be appropriate (around 19 months) for convalescence and job-seeking;
4. from that period onwards, the plaintiff, by reason of the alleged reduced work capacity, would notionally work as a clerk or gas station attendant earning HK$12,500 per month;
5. taking into account the upward adjustments to the plaintiff’s income had she remained in employment of the defendant in accordance with the reports published by the Census and Statistics Department, the plaintiff’s claim for total loss of earnings and partial loss of earnings for the pre-trial period is quantified at HK$661,646.
   1. In the light of my findings that the plaintiff’s appropriate sick leave would have expired in August 2017 and that the plaintiff could have returned to her pre-accident employment, I agree with the approach proffered by My Chung, namely that the plaintiff is entitled only to full loss of earnings from the date of the Accident to September 2017, namely one month from the expiry of the appropriate sick leave period for the plaintiff to look for employment.
   2. Mr Chung did not take into account of any increase to the plaintiff’s earnings had she remained employed by the defendant. I am of the view that an adjustment should be made in line with the figures published by the Census and Statistics Department, which was quantified by Mr Wong at HK$17,224 per month for 2017.
   3. The plaintiff’s claim is therefore quantified at [((HK$16,451 x 2)[[6]](#footnote-6) + (HK$17,224 x 9)[[7]](#footnote-7)) x 1.05[[8]](#footnote-8) =] HK$197,314.
6. *Post-trial loss of earnings*
   1. In the light of my findings, no award would have been made for post-trial loss of earnings.
7. *Loss of earning capacity*
   1. As stated at §5.12 above, Dr Lee is of the view, which I accept, that there was only potential impaired ability on the plaintiff’s part to lift heavy objects but she was otherwise able to return to pre-accident employment. There is no or no sufficient evidence that the plaintiff would have been constantly required to lift heavy objects and on the day of the Accident, she enlisted the Colleague to retrieve the warning signs for her.
   2. In my view, no award should be made under this head.
8. *Special damages*
   1. The plaintiff claims $10,000 for medical expenses, HK$500 for travelling expenses and HK$5,000 for tonic food. As I have found that the plaintiff’s sick leave should have ended in August 2017, I will make certain discounts to her claim.
   2. The plaintiff’s medical expenses are listed in schedule of medical receipts but the actual receipts are not included in the trial bundle. I will only allow HK$7,715, being the medical expenses incurred up to August 2017.
   3. I will allow the entirety of her claim for travelling expenses and HK$2,500 for tonic food.
   4. In summary, the quantum of the plaintiff’s claim (not taking into contributory negligence and taking into account payment received for employees’ compensation) is assessed as follows.

|  |  |
| --- | --- |
| PSLA | HK$120,000 |
| Pre-trial loss of earnings | HK$197,314 |
| Special damages | HK$10,715 |
| Subtotal | HK$328,029 |
| Less: EC received | (HK$465,670.57) |
| Total | Nil |

1. ***Conclusion***
   1. In the light of my conclusion on liability, the plaintiff’s claim is dismissed.
   2. I also make a costs order *nisi* that the costs of the action be paid by the plaintiff to the defendant to be taxed if not agreed, with a certificate for one counsel and that the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
   3. I thank all counsel for their assistance.

( Jonathan Wong )

Deputy District Judge

Mr Peter Wong, instructed by K Y Woo & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Gary Chung and Mr Jethro Pak, instructed by Cheng, Yeung & Co, for the defendant

1. Statement of Claim §5.2 [↑](#footnote-ref-1)
2. Statement of Claim §5.6 [↑](#footnote-ref-2)
3. Nothing turns on the plaintiff’s correction of her evidence that the relevant washroom was on the ground floor instead of the 2nd Floor. [↑](#footnote-ref-3)
4. Plaintiff’s Closing Submissions §13 [↑](#footnote-ref-4)
5. Plaintiff’s Closing Submissions §§17(b) and 23 [↑](#footnote-ref-5)
6. Full loss of earnings for 2 months in 2016 [↑](#footnote-ref-6)
7. Full loss of earnings for 9 months in 2017 [↑](#footnote-ref-7)
8. Loss of MPF [↑](#footnote-ref-8)