## DCPI 1649/2015

[2018] HKDC 139

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1649 OF 2015

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BETWEEN

CHAN WAI HING, the administratrix of

the estate of LEE GUN, deceased Plaintiff

and

MTR CORPORATION LIMITED Defendant

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Before: Deputy District Judge Johnny Ma in Court

Dates of Hearing: 7-10 February 2017

Date of Judgment: 9 February 2018

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JUDGMENT

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1. This is an action for damages for personal injuries suffered by Lee Gun (who was the plaintiff at the time of commencement of the action, but passed away on 23 October 2015) (“Lee”). The plaintiff is Lee’s widow, and carries on this action in her capacity as the personal representative of Lee’s estate.
2. The defendant was at the material time and still is the owner and manager of Telford Plaza situated at No 33 Wai Yip Street, Kowloon (“Telford Plaza”). On 26 March 2013, Lee (then aged 83) fell down on the podium level next or close to a glass door at the entrance CA1 (“the Entrance”) of Phase 1 shopping centre of Telford Plaza (“TP1”) and suffered personal injuries as a result (“the Accident”).
3. The plaintiff’s case is that on 26 March 2013 in about the evening, as Lee intended to pull open the glass door at the Entrance to get into TP1, Lee slipped by reason of the presence of water on the floor surface and fell backward. It is alleged that the Accident was caused by the negligence and/or breach of duties under the Occupiers Liability Ordinance, Cap 314 (“the Ordinance”) and in common law on the part of the defendant. It is alleged that the defendant has failed to, *inter alia*, cause the water to be cleaned up and the floor to be dried, put warning signs around the Entrance, place anti-slip carpet on the floor in the vicinity of the Entrance, and institute or enforce any adequate system for the inspection and cleaning of the floor of the area in the vicinity of the Entrance (“the Area”).
4. The defendant disputes both liability and quantum. The defendant’s case is that it had engaged Tsang Lik Services Ltd (“Tsang Lik”) and Dragon Guard Security Ltd (“Dragon Guard”) to perform cleaning work and security services respectively at Telford Plaza, and it monitored their performance. On the date in question, caution wet floor warning stands had been placed in the vicinity of the Entrance to warn visitors of the possible wet floor condition caused by the rainy weather. After Lee fell down, the staff who came to his assistance had inspected the floor but no water or water mark or stain was found, and the staff heard Lee saying that he fell down because he was feeling dizzy and unwell and his legs felt weak. The defendant denies negligence or any breach of duty on its part, and further pleads contributory negligence.
5. The plaintiff (ie Lee’s widow), an elderly person, gave evidence at trial. She was, however, not at the scene when the Accident happened and hence has no personal knowledge as to how and why it happened. Lee had prepared a witness statement dated 22 September 2015 (“Lee’s Statement”) for this action, but as aforesaid he passed away on 23 October 2015. The parties have agreed that Lee’s Statement shall be admissible as hearsay evidence subject to this court’s assessment as to the weight to be attached thereto.
6. The defendant has called three witnesses. DW1, Lau Wing Nam (transliterated) (“Lau”), senior security supervisor employed by Dragon Guard, was one of the staff who attended to Lee shortly after he fell down. DW2, Yim Po Ki (transliterated) (“Yim”), senior shopping centre officer employed by the defendant, worked at Telford Plaza in 2009 to 2011 and from September 2013 onwards, and was not working at Telford Plaza on the date of the Accident. She said that she was responsible for supervising and monitoring the cleaning aspects of Telford Plaza when she was working there. DW3, Wong Shu Hong (transliterated) (“Wong”), senior shopping centre officer employed by the defendant, was on duty in the management office of Telford Plaza at the time when the Accident happened. He said that he was responsible for supervising the performance of Dragon Guard.
7. On the issue of liability, the following issues arise for the court’s determination:-
   1. Whether Lee fell down because he slipped on a wet surface or for some other reason;
   2. Whether the defendant has breached any duty of care owed to Lee.

*Whether Lee fell down because he slipped on a wet surface or for some other reason*

1. First, there is a dispute between the parties as to whether the floor surface of the Area was wet at the time when Lee fell down.
2. It is not in dispute that on 26 March 2013, Thunderstorm Warning was issued at 3:30pm and lowered by 10:20pm, and Amber Rainstorm Warning was issued at 4:50pm and lowered by 7:35pm. According to Wong (DW3), while he was on duty in the management office at the time of the Accident, he had in fact gone out on patrol before the Accident, and he would have walked past the Area at about 4:00pm. Under cross-examination, Wong agreed that there were water marks on the floor in the Area when he patrolled to the Area, as it was a rainy day and passers-by would continuously bring in rainwater from outside on rainy days when they walked past the Area, and no cleaner had been arranged to clean up those water marks that he saw at the time of his patrol.
3. Whilst the Area where Lee fell down was under cover, given its close proximity to the uncovered part of the podium level of Telford Plaza (“the Podium”), I consider that as a matter of inherent probability, the Area was susceptible to getting wet on a rainy day as people coming to or past the Area from the uncovered part of the Podium would bring in rainwater. This is also borne out from Wong’s evidence set out above.
4. According to Lee, on 26 March 2013, it had been raining intermittently since the morning, and the rain was sometimes heavy, sometimes light, with occasional thunderstorm. When he got off the bus near Telford Plaza, it started to rain, but he only got a little bit wet before he reached a covered place. He got up to the Podium and walked slowly all the way under cover to reach the Entrance. He used his right hand to hold the handle of the glass door at the Entrance, and when he was pulling it open, he slipped and fell backward and landed his buttocks on the floor. He had touched the ground with his palm and felt that the floor surface was wet and slippery, and his trousers got wet at the buttocks and the trunks.
5. The plaintiff, as aforesaid, was not at the scene when the Accident happened. After she was informed of the Accident over the phone, she went to the hospital. It is the plaintiff’s evidence that when she returned home from the hospital and took Lee’s clothes out from a bag for washing, she noticed that Lee’s shirt and trousers were wet.
6. Mr Sakhrani, Counsel for the defendant, submitted that the plaintiff has a very poor memory of events (and he cited a few examples) and hence the plaintiff’s aforesaid evidence cannot be relied upon. However, the plaintiff’s aforesaid evidence has not been specifically challenged under cross-examination, and I accept this piece of evidence.
7. I bear in mind that the defendant has no opportunity to test Lee’s evidence by cross-examination. I consider that Lee’s evidence that his trousers got wet at the buttocks and the trunks is corroborated by the plaintiff’s aforesaid evidence that she noticed that his shirt and trousers were wet. Lee’s evidence that the floor surface was wet is consistent with the inherent probability that the Area was susceptible to getting wet on the date of the Accident, which was a rainy day, and this explains why Lee’s trousers got wet at the buttocks and the trunks after he fell down. I accept Lee’s aforesaid evidence.
8. The defendant has adduced two written records which were made either contemporaneously or shortly after the Accident. The first one was an extract from the Occurrence Book (“the Occurrence Book”), and the relevant entries concerning the Accident were written by DIP33608 Keung Man Kit (transliterated) who was on duty in the control room when the Accident happened. The other was a Security Incident Report dated 26 March 2013 made by SIP33605 Lam Yat Hang (transliterated) (“Lam”) (“Lam’s 1st Report”) who arrived at the scene after Lau (DW1). There was no mention of there being no water stain or mark on the floor at the scene in either of these two written records.
9. The first written record which contained a statement to the effect that no water stain or mark was found on the floor at the scene where the Accident occurred was made on 23 May 2013. According to Lau, on the date of the Accident, he was on patrol on the Podium near the Entrance when he received a report over walkie talkie that a passer-by had fallen down at the Entrance. He arrived at the Area very soon. He saw Lee on the ground, and a female passer-by and security guard 33609 Wong Kin Man (transliterated) were at the scene, but he did not see any cleaner nearby. Lau said that he had attended to Lee at the scene until the arrival of the ambulance men. He later made a Security Incident Report on 23 May 2013 as his written record of the incident (“Lau’s Report”), in which he wrote, among other matters, that he did not find any water stain or mark on the floor at the scene.
10. Apart from Lau’s Report noted above, there were also two other Security Incident Reports made on the same date, ie 23 May 2013, one by Lam (“Lam’s 2nd Report”), and the other one by Ng Man Sang (transliterated) (“Ng”) who was a manager of Tsang Lik and who had also been to the scene upon his receipt of a verbal report of the Accident from the security staff (“Ng’s Report”). In both reports, Lam and Ng respectively said (among other matters) that there was no water stain or mark on the floor at the scene.
11. In my view, the statements in Lau’s Report, Lam’s 2nd Report and Ng’s Report that there was no water stain or mark on the floor at the scene are not reliable. There was no contemporaneous record to that effect. Neither Lam nor Ng has been called by the defendant to give evidence at trial. Also, none of the cleaners or foreman on duty on the date of Accident has been called to give evidence or prepared any written statement or report as to what they had in fact done on that date. Under cross-examination, Lau agreed that Lau’s Report, being about two months after the Accident, was made simply on the basis of his memory. In any event, in light of the inherent probability that the Area was susceptible to getting wet on a rainy day given its close proximity to the uncovered part of the Podium, it is unlikely that there was no water stain or mark on the floor at the scene.
12. Having considered all the evidence and inherent probabilities, I reject the defendant’s evidence to the effect that there was no water mark or stain on the floor in the Area at the time of the Accident. I find as a fact that at the time of the Accident, there was rainwater on the floor surface of the Area. I will consider the question of how wet it was when I later address the issue as to whether the defendant has breached any duty of care in the circumstances of the present case.
13. Secondly, the defendant takes issue as to why Lee fell down. It is the defendant’s case that when representatives of the defendant came to Lee’s assistance after his fall, Lee claimed that he accidentally fell onto the floor because he was feeling dizzy or unwell and his legs felt weak prior to the Accident. In this regard, Lau has been called to testify to it. According to Lau, he was the second staff who arrived at the scene after Lee has fallen down. He asked Lee about his injury and how the Accident happened, to which Lee replied that he fell down because he felt dizzy and weakness in his legs. Lee also said that he felt pain on his waist. Ambulance was called for Lee at once.
14. Mr Sakhrani also referred to the medical records and submitted that such records showed that on the date of the Accident Lee was suffering from flu and fever and had taken medicine which, Mr Sakhrani said, caused dizziness and weakness in the legs. In essence, it is the defendant’s case that it was not slippery surface but such dizziness and weakness in the legs which caused Lee to fall to the ground at the Area.
15. According to Lee’s Statement, the conversation which Lee had with the staff at the scene was different. Lee said that the staff asked him about his injury, age, contact phone number, address, etc., and he answered accordingly. The staff asked him why he fell down, and he replied that he slipped. The staff has also asked him whether he suffered from any cardiac disease or chest discomfort, etc, to which he answered in the negative. The staff asked him whether he was painful, and he only told him that he felt scared.
16. Insofar as the medical records are concerned, such records included, among others, the Ambulance Report which showed that the mechanism of injuries was slip and fall, and an Inter-Disciplinary Fall Assessment Form completed on the next day which showed that, insofar as fall mechanism was concerned, the box “Slipped” (but not the box “Dizziness” or the box “LL Weakness” (ie lower limb weakness), or any other box) was checked.
17. The medical records did show that Lee was suffering from flu and fever on the date of the Accident. However, it does not follow that Lee was suffering from dizziness or weakness in his legs prior to the fall, whether because of the flu or fever, or the medicine that he had taken, and there is no clinical or medical evidence in support of such a case. The medical records in fact stated that Lee was admitted into the hospital with no preceding dizziness or chest discomfort, and that he had left hip pain and was unable to walk after the fall.
18. There is also no clinical or medical evidence suggesting that Lee fell down because of dizziness or weakness in his legs. As noted above, the medical records in fact stated the fall mechanism as slipped, as opposed to dizziness or lower limb weakness. Besides, Lee has in fact walked safely under cover up to the Area. If Lee fell down because of dizziness or weakness in his legs, he could have fallen down even when he was walking on dry surface anywhere along Telford Boulevard, but the fact is that he only fell down at the Area where, as I found above, there was rainwater on the floor surface.
19. The defendant relies on the entries in the Occurrence Book and Lam’s 1st and 2nd Reports, Lau’s Report and Ng’s Report to support the contention that Lee told the staff that he felt dizzy and weak in his legs which caused him to fall down. However, it was only Lau who has had the conversation with Lee, but Lau has not made any contemporaneous written record of the Accident, and the other makers of those written records received verbal report of such conversation from Lau or heard it from someone else.
20. Having considered all the relevant evidence, I do not find Lau’s account, that Lee told him that he fell down because he felt dizzy and weak in his legs, to be reliable. There are discrepancies among the various written records as to what Lee has allegedly said. Under cross-examination, Lau gave some further details of his conversation with Lee which have not been recorded in any of the defendant’s records. Lau said that he had told the ambulance men that Lee felt dizzy and thus fell to the ground, but there was nothing recorded in the Ambulance Report to that effect. Rather, the Ambulance Report recorded the mechanism of injuries as slip and fall, without any note to dizziness. It is in my view unlikely that Lee would have given two different accounts as to why he fell down within such a short period of time.
21. I find that when Lau asked Lee about his injury and what happened, Lee replied that he felt dizzy and weak in his legs, and Lee might also have told Lau that he felt pain on his waist. It might be that Lee felt dizzy and weak in his legs *consequent upon* the fall, and this is consistent with the medical records stating that Lee had no preceding dizziness but was having trauma and unable to walk after the fall. Lee might not have told Lau that he slipped, or if Lee had mentioned about it, Lau might have missed it. However, I find that Lee has not said that he fell down *because of* dizziness or weakness in his legs, and insofar as Lau believed that this was the case (and hence reported to the others as such), he was mistaken.
22. In the premises, I find that there was rainwater on the floor surface at the Area, and Lee fell backward and down to the ground at the Area because he slipped when he was trying to pull open the glass door at the Entrance.

*Whether the defendant has breached any duty of care owed to Lee*

1. Mr Pun, Counsel for the plaintiff, cited *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 and submitted that the burden lies on the defendant in the circumstances of the present case to prove that they had taken reasonable care or precaution to prevent the slip and fall accident in discharge of their duty of care. In that case, the plaintiff slipped and fell over some yogurt on the floor in the supermarket. Megaw LJ said at pp 815-816 as follows:-

“… 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. …”

1. Mr Sakhrani submitted that it cannot be an unusual event if a person slips on a surface with wet stains caused by wet shoes brought in from the rain. He cited *Laverton v Kiapasha (T/A Takeaway Supreme)* [2002] EWCA Civ 1656. In that case, the claimant slipped and fell in the defendant’s take-away shop. On the date in question, it had been raining heavily. Although the rain had stopped by the time the claimant reached the defendant’s shop, customers on a busy night walked wet and dirt into the shop, and the judge found that there was a considerable, significant or substantial quantity of water on the shop floor. The judge found that given the amount of water reasonable care had not been taken in operating the cleaning system, and found in favor of the claimant. The majority of the Court of Appeal (Mance LJ dissenting) allowed the defendant’s appeal and dismissed the claimant’s claim. Hale LJ said as follows (to which Mance LJ also expressed agreement):-

“16. The occupier's duty of care is the same in all cases but its application depends, and depends crucially, upon 'all the circumstances' of the particular case before the court. He has to take 'reasonable' care to see that his visitors are 'reasonably safe'. He does not guarantee their safety. The shop-keeper's duty was put this way by Lord Goddard CJ, in *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911, at 912:

"The duty of a shopkeeper in this class of case is well-established. It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and *if an unusual danger is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present*, the onus of proof is on the defendants to explain how it was that the accident happened."

Hence, in *Ward v Tesco Stores Ltd* [1076] 1 WLR 810, this Court held that where a supermarket customer had slipped on yoghurt from a pot which had fallen on the floor, it was not for her to show how long it had been there. This sort of accident did not happen in the ordinary course of events if the floor was kept clean and spillages dealt with as soon as they occurred. The probability was that the spillage had been on the floor long enough to be dealt with. Hence there was an evidential burden on the defendant to show that accident did not arise from want of proper care on their part.

17. The judge in this case found it unnecessary to resort to the principle in *Ward v Tesco*. In my judgment he was right not to do so. There was no question that the floor was wet. The issue then is what it is reasonable to expect a shopkeeper to do about it. *There is a distinction between particular dangers such as greasy spillages, which it is reasonable to expect a shopkeeper to deal with straightaway, and the general problem posed by walked in water on a wet night, which can never be completely avoided. Everyone coming in from the wet outside to the drier inside brings water with them on their feet*.

18. A take-away shop or other food outlet has to consider cleanliness and hygiene as well as safety. It is reasonable for him to have a tiled rather than a carpeted floor (indeed it would not surprise me to learn that the food hygiene regulations required a surface which could be easily cleaned). Some tiled surfaces are slippier than others are when wet and it is reasonable to expect him to choose a surface which is more rather than less resistant to slips. In doing so he should go to a reputable manufacturer, but he is entitled to rely upon their promotional literature unless and until experience shows that this is over-optimistic. The manufacturer's brochure for these tiles has already been quoted. The defendant's uncontradicted evidence was that there had been no previous incidents of this sort.

19. It is not reasonable to expect such a surface to be kept dry at all times. If the judge was saying that the defendant should have done so, then in my view he was wrong. But wetness does increase the risk of slipping and it is reasonable to expect the shopkeeper to do something to prevent and control it. After all, there is not much the customer can do about it: she may be expected to wipe her feet on a mat but not to mop the floor. In some large businesses it may be reasonable to expect stringent precautions at the shop door, including mats large enough to absorb the moisture from large numbers of customers who do not wipe their feet and/or a member of staff stationed near the door to mop up as required. Even this is unlikely completely to eliminate the problem, for most mopping operations leave some moisture on the floor unless it can be closed off while it dries. Mopping up spillages, while decreasing one type of risk, is likely to leave a damp floor for a while.

20. *The question is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference*.” (emphasis added)

1. In my view, the presence of rainwater in a rainy day on the floor surface at the Area, which was not within enclosed surroundings and was in close proximity to the uncovered part of the Podium such that visitors to TP1 would keep bringing in rainwater to the Area, was not in itself an unusual event and did not, without more, present itself as an unusual danger. As Peter Gibson LJ said in *Laverton* at para.36: “when the wetness comes from rain brought in by the feet of customers, that danger seems to me both obvious and unavoidable”. Indeed, Mr Pun acknowledged, rightly so in my view, that it was reasonably foreseeable that in rainy weather, visitors from the uncovered area of the Podium would bring rainwater to the Entrance. In the circumstances of the present case, I respectfully agree with the approach adopted by the English Court of Appeal in *Laverton* and in my view, the question for the present case is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference.
2. As noted earlier above, the defendant had engaged Tsang Lik and Dragon Guard to perform cleaning work and security services respectively at Telford Plaza. According to Yim (DW2), there was no change in the cleaning system implemented by Tsang Lik at Telford Plaza during the two periods when she worked there. To her knowledge, there was also no change in that cleaning system in the interim period during her absence. There were three shifts within a day: (i) morning shift from 7:30am to 5:30pm; (ii) mid shift from 5:30pm to 10:30pm; and (iii) night shift from 10:30pm to 7:30am. Some cleaners would be assigned to be responsible for a designated area (“designated cleaners”), while a few cleaners would be on mobile duty to carry out cleaning works on ad hoc basis (“mobile cleaners”).
3. According to the cleaners’ roster disclosed by the defendant, on the date of the Accident, for mid shift, there was one designated cleaner Cheng Hok Kuen (transliterated) (“Cheng”) responsible for the cleaning of Telford Boulevard (which included the Area) and Carpark D, and one foreman and two mobile cleaners on duty for TP1. Yim said that on the date of the Accident, given that the Thunderstorm Warning and Amber Rainstorm Warning had been hoisted for some time, Cheng should start off with cleaning work at Telford Boulevard which included the area in the vicinity of the entrance CA1.
4. Yim said that in terms of the total number of cleaners there was no difference between rainy days and non-rainy days, but she said that on rainy days, the mobile cleaners would be asked to focus their attention at the entrances of Telford Plaza, the drainage and sewage pipe openings and areas of water leakage to carry out cleaning works such as the mopping of accumulated rainwater at the entrances, and the foreman would carry out continuous inspection at Telford Plaza.
5. Apart from the aforesaid, according to Yim, Tsang Lik would place caution wet floor warning signs at the entrances of Telford Plaza (including the Area) on rainy days, and also the appropriate thunderstorm warning signs at Telford Plaza corresponding to the hoisted signals at the time. The defendant would hold meetings with Tsang Lik once every two weeks to discuss Tsang Lik’s performance, and would assess Tsang Lik’s performance on a monthly basis. As shown in the Contractor Performance Assessment for March 2013, Tsang Lik’s performance was assessed to be generally above average, with an excellent rating on Safety in particular.
6. Mr Pun submitted that Yim did not know exactly where Cheng was at the time of the Accident, and further emphasized that no documentary record of rainy day special safety measures has been produced by the defendant in support of the measures said to have been taken on the date of the Accident. There is however no serious challenge on Yim’s evidence as to the system of cleaning that was put in place at the material time. In any event, I find Yim to be a truthful witness, and I accept her evidence.
7. According to Wong (DW3), who was responsible for supervising the performance of Dragon Guard, security guards would patrol around Telford Plaza along designated routes. On the date of the Accident, according to the patrol reports, security guards who patrolled along route 2 and route 5 should have walked past the Area shortly after 5:00pm, that is to say, shortly before the time of the Accident which happened at about 5:45pm, and there was no report from such security guards of any unusual incidents such as the finding of puddles of water on the floor surface.
8. Wong also said that the defendant would hold meetings with Dragon Guard once every two weeks to discuss its performance, and would assess its performance on a monthly basis. As shown in the Contractor Performance Assessment for March 2013, Dragon Guard’s performance was assessed to be generally above average, with an excellent rating on a few aspects including Safety in particular.
9. Wong further said that on rainy days, the senior shopping centre officers of the management office (including himself) of the defendant would take turn to patrol around Telford Plaza including TP1 and the Podium, whilst the duty IC would be patrolling continuously around Telford Plaza including TP1 and the Podium. Wong was on patrol before the Accident, and he said that he walked past the Area at around 4:00pm. He noticed that there were water marks on the floor in the Area as it was a rainy day, but as it was not like puddles of water, he did not find it necessary to make any report about it. On 26 March 2013, other than the Accident, no other accident of a similar nature had happened.
10. As explained immediately below, there is one particular aspect of Wong’ evidence given under cross-examination to which I decide to attach little weight. That said, I do not consider that it impacts upon the reliability or credibility of Wong’s evidence as summarized in the preceding paragraphs which I accept.
11. In the course of cross-examination, Wong said that there was water-absorbing carpet placed outside the Entrance on a long-term basis. In its Defence, the defendant has neither pleaded that there was such a carpet outside the Entrance at the time of the Accident, nor specifically traversed to the plaintiff’s allegation that it has failed to place anti-slip carpet on the floor in the vicinity of the Entrance. In the witness statements of Wong, Lau and Yim all dated 25 August 2016 and served for the defendant there was no mention of there being any carpet having been placed at the Entrance at all, whether before or at the time of the Accident. Shortly before trial of this action, the defendant sought to adduce new evidence to suggest that there had been a carpet at the Entrance prior to and at the time of the Accident. On 3 February 2017, I have given my decision and declined to allow the defendant to adduce such evidence, and in this regard, I refer to my Reasons for Decision dated 16 February 2017.
12. Against the foregoing background, Mr Pun submitted that Wong’s aforesaid evidence relating to the carpet should not be admissible, as it is not the defendant’s pleaded case that such a carpet was there. With respect, I do not agree. It is true that I have disallowed the defendant to adduce new evidence at a late stage in support of an unpleaded positive case that such a carpet was there. In my view, in light of the existing state of the pleadings, the defendant should also not be allowed to rely on Wong’s aforesaid evidence in running a positive defence that it has in fact placed such a carpet there. However, it does not follow that the evidence given by Wong under cross-examination can or should thus be ruled inadmissible. It is a matter of weight to be attached to such evidence.
13. After all, it is the plaintiff who bears the legal and evidential burden in establishing her contention that the defendant has failed to place anti-slip carpet on the floor in the vicinity of the Entrance. According to Lee, when he went back to the Area in about June 2013, he found on that occasion that a carpet was placed at the Area outside the Entrance. A photograph has been taken, and he said in Lee’s Statement that the carpet as shown in that photograph was not there at the time of the Accident. Apart from this piece of evidence, the plaintiff has adduced no other evidence in this regard.
14. Lee’s aforesaid evidence on its face only suggests that the carpet as shown in the photograph was not there at the time of the Accident, but this is not exactly the same as saying that no carpet was there at the material time. Mr Pun asked this Court to read Lee’s said evidence in context. However, even if I were to construe Lee’s said evidence as saying that no carpet whatsoever was there at the time of the Accident, according to Lee, after he fell onto the ground, he panicked, and when he realized that he could not move his legs, his panic intensified. This is consistent with the Ambulance Report which recorded that Lee was having trauma. In such a state, it is inherently unlikely that Lee would have noticed at the time of the Accident as to whether or not there was any carpet placed at the Area. Lee said that when he touched the floor with his palm, he felt that the floor surface was wet and slippery. Without Lee’s evidence being tested by cross-examination, the possibility that Lee might have subsequently assumed with conjecture that there was no carpet at the Area from the mere fact of the floor surface being wet and slippery cannot be ruled out or underestimated. Having considered Lee’s Statement as a whole and bearing in mind that the defendant does not have the opportunity to test Lee’s evidence by cross-examination, I do not accept that Lee’s evidence regarding the carpet is reliable or sufficient in proving that there was no anti-slip carpet placed at the Area at the time of the Accident. In coming to this view, I have not taken into account Wong’s evidence given under cross-examination that there was water-absorbing carpet placed outside the Entrance on a long-term basis, to which I attach little weight in any event in light of the circumstances in which it came out in evidence.
15. Mr Pun submitted that on a rainy day, people walking to the covered area from the uncovered area would likely bring in rainwater which would accumulate in front of the Entrance if no arrangement was made for cleaning and drying at the Entrance and in the vicinity. The essence of Mr Pun’s submission is that special measure should have been implemented to station a cleaner at the Entrance to mop dry the Area, but this has not been done in this case.
16. In *Laverton*, the majority of the Court of Appeal held that in the circumstances of that case, which involved a small take-away shop premises with rainwater being brought into the shop by customers at busy hours on a rainy evening, it was not reasonable to expect the defendant to have a system of mopping the floor often and efficiently enough to prevent its being wet, even significantly or considerably so. On the other hand, Hale LJ also said, in *obiter* (at para.19), that “in some large businesses it may be reasonable to expect stringent precautions at the shop door, including … a member of staff stationed near the door to mop up as required”.
17. The common duty of care pursuant to the Ordinance is described in s 3(2) as “a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”. It is clear that each case has to turn on its own facts, depending on “all the circumstances of the case”. Whether it was reasonable to expect the defendant to have a system in place for a cleaner to be stationed at the Entrance to mop dry the Area on the date of the Accident as Mr. Pun submitted depends on the circumstances of this case.
18. Whilst I have found that there was rainwater on the floor surface of the Area at the time of the Accident, there is no evidence showing how wet it was at the material time, and how fast or frequent it got wet again after mopping up on that date prior to and at around the time of the Accident. There is also no evidence regarding the material of the floor surface of the Area, and how wet or damp it might remain despite mopping up in a rainy day such as that of the date of the Accident. In light of the state of the evidence and the circumstances in this case, I do not accept Mr Pun’s submission that there was a breach of duty of care on the defendant’s part on the ground that no cleaner has been stationed near the Entrance at the material time to mop dry the Area.
19. Besides, I echoed what Hale LJ said in *Laverton* at para 19 and para 22. Even stationing a cleaner near the Entrance to mop up as required is unlikely to completely eliminate the problem, for most mopping operations are likely to leave a damp floor for a while unless it can be closed off while it dries, and the reality is that on a rainy day such as that of the date of the Accident, the visitors can be reasonably safe if they take reasonable care for their own safety. The fact is that on the date in question, other than the Accident, no other accident of a similar nature had happened at Telford Plaza in general or at or near the Area in particular. In my view, it would be imposing too high a standard of care in the circumstances of this case to expect the defendant to ensure that a cleaner would be stationed near the Entrance to mop dry the Area, or to close off or place barrier around the Area for a period of time.
20. Mr Pun cited *Wong Yuk Foon v Nice Property Management Limited*, DCPI No. 1025 of 2006 (8 November 2007) and *Wong Ching Ha v Manbright Company Limited trading as Ngan Lung Restaurant*, DCPI No. 886 of 2007 (31 March 2008), in which the defendants were held wholly liable to the plaintiffs who slipped and fell in the common areas of the places under the defendants’ management. However, the first case involved a slip on some soapy water near the entrance of a toilet, and the second case involved a slip near the entrance inside a restaurant premises, and none of those two cases involved a slip on rainwater in a rainy day at an area which was not within enclosed surroundings and was susceptible to getting wet by brought-in rainwater. In my view, those cases are distinguishable from the present case, and do not assist the plaintiff herein.
21. Having regard to all the circumstances of this particular case, whilst there was rainwater on the floor surface at the Area at the time of the Accident, I find that the defendant has not breached its duty of care to Lee whether as the plaintiff alleged or at all. In the premises, the plaintiff’s claim is dismissed.
22. In light of the aforesaid, whilst it is strictly unnecessary for me to address the defence of contributory negligence and the issue of quantum, I will deal with them below for the sake of completeness, and in case I were wrong in my decision on liability.

*Contributory negligence*

1. In its Defence, the defendant pleaded that the plaintiff has failed to keep a proper lookout for the water on the floor despite the rainy weather, failed to walk with reasonable care to avoid stepping on the water despite the rainy weather, failed to heed the caution wet floor warning stands placed within the vicinity of the Entrance, failed to maintain his balance and footing, and/or walked too fast in the circumstances.
2. Lau testified, and I accept and so find, that there was one caution wet floor warning sign placed inside TP1 at the glass door next to the Entrance, and that under normal circumstances two caution wet floor warning cones would have been placed at the Telford Boulevard in the vicinity of the Area if it was a rainy day. Lee said in Lee’s Statement that there was no caution wet floor warning sign at or in the vicinity of the Area at the time of the Accident. This may be taken as supporting the contention that Lee has failed to heed the caution wet floor warning stands, at least those two which were placed at the Telford Boulevard as aforesaid.
3. Notwithstanding the aforesaid, I do not consider that Lee’s failure to heed the caution wet floor warning signs in the circumstances of this case amounts to an act or omission on Lee’s part which has materially contributed to the Accident and is of such a nature that it may properly be described as negligence connoting a failure by Lee to use reasonable care for his own safety. There is no evidence for any of the other particulars pleaded in support of the defence of contributory negligence.
4. In the premises, had I found that the defendant has breached its duty of care to Lee in the circumstances of this case, I would have found the defendant to be wholly liable without any reduction on account of any contributory negligence on Lee’s part.

*Quantum*

1. Lee was aged 83 at the time of the Accident. It is undisputed that he suffered a trochanteric fracture of his left hip following the Accident, and received surgical operation with internal fixation of the fracture with gamma nail on 27 March 2013. According to the medical records, Lee was admitted to the orthopaedic ward for further management, and was discharged on 15 April 2013. His early postoperative recovery was complicated by urinary tract infection and pneumonia. He was able to walk with a frame on discharge. He underwent physiotherapy and occupational therapy, and continued day care rehabilitation in geriatric day hospital for the subsequent 2 months. He was followed up at the Department of Orthopaedics and Traumatology of the United Christian Hospital on divers dates afterwards with serial X-ray performed showing good healing of the fracture. He was able to walk unaided independently for at least 30 minutes since 7 months after the operation. He was last seen by the Department of Orthopaedics and Traumatology on 28 April 2014 and no more follow-up in that clinic was required. When he attended follow-up at geriatrics clinic on 4 August 2014, he could walk independently without any joint pain. By July 2015 at the latest, he had resumed independent daily living ability with Barthel’s index of 100.
2. Lee was examined by orthopaedics experts Dr Fu Wai Kee (for the plaintiff) and Dr Ho Ching Lun Henry (for the defendant) on 18 September 2015, and the experts submitted a joint report. Both experts agreed that Lee has reached maximal medical improvement, and no further treatment would be required. They agreed that Lee might have some residual lower limb symptoms upon prolonged weight bearing or exertion, which would affect his activities of daily living. Dr Fu opined that Lee’s condition should be stable, and his lower limb impairment would likely persist, and he would have on and off pain that would require treatment on a need-to basis, and would have difficulty in long period of walking. Dr Ho agreed, and opined that the pain in his left hip should be mild, and his walking endurance might be mildly reduced, but otherwise, he was independent with activities of daily living and travelling outdoor. Dr Fu opined that the Accident should have caused significant impairment to Lee, and as at the date of the examination Lee would need occasional use of walking aid with hip pain, and the impairment of whole person was assessed at 18%. Dr Ho, on the other hand, opined that Lee’s ambulatory capacity was comparable to most people of his age, and assessed the whole person impairment at 6% for residual left hip pain, weakness and loss of hip motion. Neither Dr Fu nor Dr Ho has testified at trial.
3. I consider that Dr Fu’s assessment of whole person impairment of 18%, on the basis that the Accident should have caused significant impairment to Lee and Lee would need occasional use of walking aid with hip pain, did not sit comfortably with the experts’ agreed position that Lee should be independent in most of the activities of daily living, and the medical records which stated, *inter alia*, that by 4 August 2014 Lee could walk independently without any joint pain and that by July 2015 at the latest he had resumed independent daily living ability with Barthel’s index of 100. In my view, Dr Ho’s view of whole person impairment of 6% is more consistent with the experts’ agreed position and the medical records and is to be preferred.
4. In the Revised Statement of Damages dated 26 July 2016, the plaintiff claims for the following damages:-

|  |  |
| --- | --- |
| PSLA | $300,000 |
| Care and Services of Wife | $60,000 |
| Medical Expenses | $4,000 |
| Tonic Food | $5,000 |
| Walking Stick and Wheelchair | $4,000 |
| Travelling Expenses | $2,000 |
| Diapers for Adults (31 months) | $3,100 |

1. Mr Sakhrani indicates that the defendant agrees to the plaintiff’s claim for medical expenses, walking stick and wheelchair and travelling expenses in the respective amount as claimed, but disputes the quantum for the remaining items.

*PSLA*

1. Mr Pun referred to the following cases, and submitted that Lee’s injuries should be placed at about 60% below the “serious injury” category, and the plaintiff thus claims for an award of $300,000 for PSLA:-
   1. *Choi Siau Bon v Chevalier Construction (Hong Kong) Ltd and Others*, HCPI 913 of 2000 (20 February 2002);
   2. *Ku Chiu Chung Woody v Tang Tin Sung*, HCPI 288 of 2001 (20 September 2002);
   3. *Yan Chui Sum v Paul Y – ITC General Contractors Ltd and Others*, HCPI 244 of 2003 (1 September 2004);
   4. *Lam Chu v Tse Lum Wong and Another*, HCPI 626 of 2003 (21 September 2004);
   5. *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre*, HCPI 686 of 2004 (20 July 2006);
   6. *Chan Yuet Keung v Harmony (International) Knitting Factory Ltd* [2010] 3 HKLRD 599 (2 November 2010); and
   7. *Wong Hin Chuen v Wang On Majorluck Ltd and Others*, DCPI 58 of 2015 (5 December 2016).
2. Mr Sakhrani referred to the following cases in which an award of $150,000 for PSLA has been made by the Court, and submitted that the same amount (subject to increment on account of inflation) should be awarded for the present case:-
   1. *Chan Kwok Wah v Tsoi Leung Ming trading as Tsoi Ming Gei Engineering Co*, DCPI 412 of 2004 (24 June 2005);
   2. *Lam Pik Kuen v Lee Fai Ming and Another*, HCPI 7 of 1998 (18 May 2000); and
   3. *Woo Wai Kuen v Li Siu Keung trading as Alex’s Kitchen*, DCPI 309 of 2001 (19 June 2002).
3. I have considered the above cases referred to by both sides. In my view, the present case is more comparable to *Wong Hin Chuen* and *Lam Pik Kuen* than the other cases cited. In *Lam Pik Kuen*, a case decided in May 2000, the plaintiff suffered from a fractured left superior and inferior pubic rami. After treatment and discharge, she had recovered sufficiently to be able to walk slowly with the aid of a quadripod. Her fracture healed satisfactorily. The judge found that her whole person disability was at about 7%, and that she would have a continuing and significant disability in the sense that she would suffer pain in future and be less able to walk, stand and carry heavy objects. The judge awarded a sum of $150,000 for PSLA.
4. In *Wong Hin Chuen*, a case decided in December 2016, the plaintiff suffered a fracture of the left neck of femur which necessitated an Austin Moore hemiarthroplasty of the hip, and he was left with residual left hip pain. The plaintiff’s mobility such as walking, standing and squatting could be slightly adversely affected, and he might have to undergo another surgery after 10 years when he would be aged 80. The judge awarded a sum of $300,000 for PSLA.
5. In the present case, there has been good healing of the fracture, and unlike the case of *Wong Hin Chuen*, there was no need for Lee to undergo another surgery or any further treatment. Taking into account the two cases as a reference, and the need for a proper adjustment on account of inflation from year 2000, I would have awarded the sum of $250,000 for PSLA.

*Care and Services of Wife*

1. Mr Pun cited *Cunningham v Harrison* [1973] QB 942, where Lord Denning MR said at p.952A-C as follows:-

“… It seems to me that when a husband is grievously injured – and is entitled to damages – then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her. She cannot herself sue the wrongdoer … but she has rendered services necessitated by the wrong-doing, and should be compensated for it. … Even though she had not been doing paid work but only domestic duties in the house, nevertheless all extra attendance on him certainty calls for compensation.”

1. In the Revised Statement of Damages, the plaintiff claims damages for gratuitous service rendered by her equivalent to market rate of a part-time domestic helper at $5,000 per month for a period of 12 months, and hence the amount of $60,000.
2. Mr Sakhrani accepted that the plaintiff is entitled to some damages for her care during hospitalization and thereafter, but submitted that Lee recovered quickly and was mobile within 6 weeks. As the primary caretaker at home, he submitted that the plaintiff could only be compensated for the additional care but her evidence (Mr Sakhrani said) is unhelpful and unreliable in this regard. The defendant allows for a sum of $2,000 per month for 7 months, and hence the amount of $14,000.
3. In terms of period, according to the medical records, Lee was able to walk unaided independently for at least 30 minutes since 7 months after the operation. By 28 April 2014, no more follow-up in the Department of Orthopaedics and Traumatology was required, and by 4 August 2014, he could walk independently without any joint pain. In light of the aforesaid, I consider that the plaintiff’s claim for value of her services for a period of 12 months is justified.
4. Regarding the monthly amount, there is no evidence suggesting that Lee and the plaintiff have ever employed any domestic helper whether before or after the Accident. There is also no evidence suggesting that they would have wished to employ a domestic helper but for any financial concern on their part. According to the plaintiff, prior to the Accident, Lee would help in the domestic duties. After the Accident, the plaintiff would have to take care of his daily living in addition to doing the general domestic duties. In these circumstances, I am of the view that a claim of $5,000 per month for this head is on the high side.
5. On the other hand, the amount of $2,000 per month appears to me on the low side. Mr Sakhrani referred to *Lai Hing Wan v Kowloon-Canton Railway Corporation*, HCA 4338 of 19984 (7 March 1988) and *Lam Chu v Tse Lum Wong and Another*, HCPI 626 of 2003 (21 September 2004). In the former case, Penlington J adopted the rate of $2,500 per month, whereas in the latter case, Burrell J adopted a rate of $80 per day (or in other words, an amount of about $2,400 per month). For the present case, I am of the view that an amount of $3,000 per month is more reasonable.
6. In the premises, I would have awarded the amount of $36,000 (ie $3,000 x 12 months) for this head.

*Tonic food*

1. Mr Sakhrani submitted that there is no evidence and basis for the claim for tonic food, but the defendant agrees to $2,000.
2. Both Lee and the plaintiff have mentioned in their respective witness statement about purchasing tonic food for Lee. The plaintiff is unable to produce any relevant receipts, and Lee gave the amount of about $5,000 as money spent on tonic food. Mr Pun submitted that the plaintiff’s claim of $5,000 for tonic food is not extravagant.
3. I agree with Mr Pun in this regard, and would have awarded the amount of $5,000 for this head as claimed.

*Diapers*

1. In the Revised Statement of Damages, the plaintiff claims an amount of $100 per month for 31 months as expenses for diapers for adults. The 31-month period spans from the date of the Accident up to the date of Lee’s death. In Lee’s Statement, Lee said that he had to use diapers after the Accident as he found it inconvenient to get up in the middle of the night to go to toilet.
2. Mr Sakhrani submitted that there is no expert evidence showing that Lee’s urinary incontinence was caused by the Accident, and hence there is no basis for the diapers, except during hospitalization and shortly thereafter when Lee was not mobile, and the defendant agrees to a total sum of $400 for a period of 4 months.
3. I agree that there is no medical evidence showing that Lee’s urinary incontinence (if any) was caused by the Accident, and that the award under this head should be confined to the period of Lee’s immobility, which would also be consistent with Lee’s evidence as to the reason for his need to use diapers. As noted above, the medical records show that by 4 August 2014 (ie about 16 months after the Accident), Lee could walk independently without any joint pain. The plaintiff claims a period of 12 months for her care and services rendered to Lee, and I consider that the same period of 12 months should be adopted for this head as well. In the premises, I would have awarded $1,200 (ie $100 x 12 months) for this head.

*Conclusion on quantum*

1. In the premises, had I found against the defendant on liability, I would have awarded a total sum of $302,200 as damages, as follows:-

|  |  |
| --- | --- |
| PSLA | $250,000 |
| Care and Services of Wife | $36,000 |
| Medical Expenses | $4,000 |
| Tonic Food | $5,000 |
| Walking Stick and Wheelchair | $4,000 |
| Travelling Expenses | $2,000 |
| Diapers for Adults (31 months) | $1,200 |
| Total: | $302,200 |

If the plaintiff is otherwise entitled to damages as aforesaid, I would have awarded interest on damages for PSLA at the rate of 2% per annum from the date of service of the writ until the date of judgment, and on special damages at half of judgment rate from the date of the Accident until the date of judgment, and thereafter at judgment rate until payment.

*Conclusion*

1. In the circumstances of the present case, I find that whilst there was rainwater on the floor surface at the Area at the time of the Accident, the defendant has not breached its duty of care to Lee whether as the plaintiff alleged or at all. Accordingly, the plaintiff’s claim is dismissed.
2. I make an order nisi that the plaintiff shall pay the defendant’s costs to be taxed if not agreed, with certificate for Counsel, while the plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations.

( Johnny Ma )

Deputy District Judge

Mr Chase Pun, instructed by Cheng & Wong, assigned by the Director of Legal Aid, for the plaintiff

Mr Ashok Sakhrani, instructed by Deacons, for the defendant