## DCPI 1675/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1675 OF 2012

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##### BETWEEN

CHAN NGA YIN formerly known as

CHAN MEI YI SICELY Plaintiff

### and

MTR CORPORATION LIMITED Defendant

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Coram: His Honour Judge Tam in Court

Dates of Hearing: 14 to 16 April 2014

Date of Judgment: 25 June 2014

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JUDGMENT

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*Background*

1. The plaintiff was a lawful visitor to a shopping mall managed and operated by the defendant. On 24 November 2010, in the evening, after having dinner with her son in a restaurant in Luk Yeung Galleria, the plaintiff alone walked along a public corridor in the same shopping mall intending to visit a supermarket. When she reached near the place of accident, she saw to her left a cleaning lady mopping the floor. She took a little detour to the right as a precaution but otherwise continued to proceed forward. Very soon afterwards, she entered the view of the CCTV camera and one could see from the video footage that she slipped and fell backwards onto the floor with her left palm pressing against the floor instinctively no doubt trying to lessen the harm that might befall her.
2. She suffered left wrist injury as a result.

*Issues*

1. The plaintiff sued the defendant for damages for negligence and for breach of common duty of care stipulated in the Occupier’s Liability Ordinance, Cap 314. The particulars of negligence as pleaded were:-
2. Failing to ensure that the floor of the Premises was safe for the plaintiff, in particular that the floor was slippery.
3. Exposing the plaintiff to an unnecessary risk of injuries of which the defendant knew or ought reasonably to have known by failing to clean and/or dry the floor and leaving the floor in an undesirably slippery condition.
4. Failing adequately or at all to examine, inspect, or maintain the floor to ensure that the floor was properly maintained so as to ensure that it was safe for use by the plaintiff.
5. Failing to devise, institute, operate or ensure the institution or operation of an adequate system of house-keeping or cleaning adequate system of house-keeping or cleaning of the floor, whereby the presence of the wetness upon the same might have been detected and cleaned.
6. Permitting or suffering the floor to come to be or to remain wet, slippery and dangerous.
7. Failing to use non-slippery surface on the floor.
8. Failing to give visitors, in particular the plaintiff, any or any adequate warning of the slippery and dangerous conditions of the floor.
9. Failing to recognize and rectify potential risks in the Premises.
10. In the premises, the defendant was in breach of its duty of care in tort by failing to take any or any adequate care for the safety of the plaintiff and exposing the plaintiff to a danger or an unnecessary risk of injury of which the defendant knew or ought reasonably to have known and failing to ensure the plaintiff was safe inside the Premises.
11. The plaintiff pleaded, as is customary in this sort of cases, further and in the alternative, that the accident, pain, suffering and personal injuries were caused by a breach of occupiers’ liability on the part of the defendant.

*Liability*

1. On liability, the issues are threefold:-
2. Was there water or slippery substance on the floor at the place of accident ?
3. If yes, whether the cleaner was negligent by failing to place any warning sign at or near that place, and if so, whether her employer i.e. the cleaning contractor was vicariously liable ?
4. Whether the defendant was liable as someone who had engaged that cleaning contractor under the law of negligence or otherwise liable under the Occupier’s Liability Ordinance, Cap 314.

*EVIDENCE*

*CCTV Video*

1. The main evidence came in the form of a DVD which had recorded in it what was captured by a fixed CCTV camera overhanging and pointing towards a patch of what appeared to be a major corridor in the shopping mall. On the left of the passage was a restaurant known as “Nam Cheung”; on the right of the passage was another restaurant known as “Viet Tsan”.
2. A brief sequence of the footage is as follow:-

CCTV counter Events

0100 man in suit (security staff)

0120 cleaner with warning sign

0200-0347 warning sign moved from place to place as mopping continued

0250 man in suit (security staff)

0610 cleaner holding warning sign

0625 warning sign out of the area

0649-0655 mopping with baby push cart nearby

0718-0734 cleaner mopping the accident spot (with no warning sign seen)

0736 plaintiff appeared and walking towards the accident spot

0740 plaintiff fell down --- the accident

0750 cleaner by plaintiff’s side

0805 plaintiff stood up and walked away

0825 man (long sleeve shirt) walked past accident spot

0848 man (dark T-shirt) walked past accident spot

0853 woman (pink upper clothing) walked past accident spot

0900 woman (red upper clothing) walked past accident spot with a stick

0950 plaintiff re-appeared and walked towards bottom part of the screen

1210 cleaner walked past with mop

1400-1515 photos taken by security staff

1413 cleaner holding sweeper accompanied by a woman (likely foreman)

1820 photos taken by security staff in suit

1846 cleaner present with sweeper

1949 cleaner ran to fetch a warning sign

2000 cleaner emerged from far end with a warning sign and placed it at accident spot

2007 security staff removed the warning sign to a nearby place before taking photo

2020 cleaner sweeping

2030 security staff left without taking the warning sign with him

2033 cleaner with sweeper walked past

2130 cleaner sweeping the floor (warning sign sill unremoved)

2204 two cleaners on screen together

2300 man in suit (security staff) walked past

2327 trolley being pushed past

2630 sweeping cleaner appears with a second warning sign

2756 man in suit (security staff) appears

3024 cleaner with sweeper appears

3107 cleaner with sweeper appears

3323-3409 repeats 3043-3131

3505-end repeats 2954-3045

1. Before commenting further, I have to say that the DVD which has been provided by the defendant and agreed by the plaintiff contains defects in that there are certain repetitions at and near the end of the disk of earlier parts of the video footage. Fortunately for me, the salient parts of the disk, as indicated by the parties, are free from such defects.
2. What is apparent from the early parts of the disk is that the cleaner was quite diligent in her work in that while she was on the screen, she was at most times apparently looking for dirt on the floor (probably left by passers-by); and then when she found something she mopped it off.
3. In the critical part of the video, that at 0649-0740, it can be seen that the cleaner mopped the floor without the warning sign being seen anywhere onscreen; that shortly after the cleaner had cleaned the accident spot, the plaintiff walked on it and slipped.

*PW1 Chan Nga Yin*

1. PW1 (plaintiff) was aged 46 at time of accident and is now aged 48. Before the accident, she took care of most of the household chores. She completed F1 education.
2. On 24 November 2011, at about 8:30 pm, after her dinner at 2/F of Luk Yeung Galleria, she was walking along the corridor at ordinary speed outside a restaurant called “Viet Tsan” when she saw a female cleaner mopping the floor. She took a little detour to the right and continued forward. Not long, she slipped and fell. She landed first with her left wrist resulting in injury. She asked the cleaner to call an ambulance. Security personnel later came for follow-up action and called for an ambulance which eventually came. After initial examination, PW1 was taken to Yan Chai Hospital for treatment.
3. At the hospital, it was confirmed that PW1 had suffered a fractured left wrist and she was admitted to the Orthopaedic ward. She was discharged home on 26 November 2010. On 29 November, she was re-admitted for operative treatment. Open reduction and internal fixation with metallic implant in situ were performed under general anaesthesia. She was discharged home on 3 December 2010.
4. Thereafter she was seen again at the out-patient department of Yan Chai Hospital on 15 December 2010, 12 January, 23 February and 18 May 2011. Separately, she received 5 sessions of physiotherapy treatment between 20 January and 24 February 2011.
5. After the accident, she received 107 days of sick leave between 24 November 2010 and 9 March 2011.
6. As of April 2013, there was still periodical persistent pain; she felt numb and without energy and could not lift heavy objects; she had difficulty performing household chores; the pain became more intense when the weather changed or when she attempted to lift heavy objects.
7. After the accident, she employed hourly domestic helpers. Although originally she wished to claim under special damages the expenses incurred in doing so, in the course of her giving evidence, she confirmed her counsel’s withdrawal of such claim.
8. She also claims loss of earning capacity and other damages more particularly specified in the “Revised Statement of Damages”.
9. PW1 is now engaged as a baby-sitter for newly-born babies of under one month old. She started at the end of 2013 and worked as such from time to time occasionally, each time for one month and thereafter resting for 2 months. As part of her work, she needed to pick up a baby and hold a portable bath tub. Whenever she had to use force, she would concentrate on using her right hand. In order to avoid fatigue on both hands, she would take a rest of 2 months after working for one month.
10. If PW1 was not injured, she would have had more freedom to look for jobs.
11. PW1 confirmed that the day of the accident was not a Saturday or Sunday. On the day in question, she had just had dinner with her son in a restaurant in the same mall and was alone intending to go to the supermarket.
12. PW1 said that just before she entered the camera screen, she saw the cleaner mopping the floor to her left but she did not see any yellow warning sign beside the cleaner. Since the cleaner was cleaning the floor to her left, she avoided the left hand side and steered more to the right in her path.
13. She did not think she should take care or slow down when walking towards the accident spot (located at the centre of the camera screen).
14. If there was a yellow warning sign along the way (she was walking), she would have been alerted. Otherwise, she expected the place to be safe.
15. She felt it was slippery immediately before she fell. After she fell, she could feel the floor was wet with her hand.
16. Initially after the fall, PW1 thought that she could deal with her hand after she returned home. However, after a short while, she went back to the accident scene (and was caught on CCTV).
17. It was suggested to her and which she denied that she slipped simply because she was careless or was walking too fast.
18. It was suggested but denied that the accident scene was not wet or slippery and that the mopping had not wetted the floor.

*DW1 Yung Chi Wing*

1. DW1 was the senior mall affairs officer employed by the defendant that was stationed in Luk Yeung Galleria and was authorized by the defendant to provide information in respect of the subject accident. His duties were to manage the daily operation of the mall. At time of the accident, the cleaning work of the mall had been outsourced to Winson Cleaning Service Company Limited (“Winson”).
2. The defendant’s management office at Luk Yeung Galleria opened between 8:30 am and 6:00 pm. At the time of the accident, DW1 was off duty and therefore he found out what happened only afterwards.
3. DW1 was able to say that the restaurant on the left of the CCTV screen was Nam Cheung; and that the cleaner who had been mopping the floor in the company of the warning sign was someone from Winson.
4. DW1 referred to a Security Incident Report (Trial Bundle 110) in which it was recorded by Y C Wong (staff no 33040) of Dragon Guard Security Company (the security contractor of the defendant) that:-
5. according to CCTV, at 2027 hours the injured fell;
6. 33040 received a report from one Ms Yee (supervisor who has now left employment) of the Cleaning Department at 2031 hours that a woman had accidentally fallen, and asked the security office to call for an ambulance;
7. again at 2031 hours, 33040 asked colleagues 33041 and 33049 to go there and follow up, and call for an ambulance;
8. at 2032 hours, 33041 reported that he had arrived and was consoling the injured who described what had happened and asked that the security office call for an ambulance;
9. at 2049 hours, 33041 reported that the emergency services had arrived to examine the injured at the scene; and
10. at 2101 hours, 33041 reported that it was necessary for the injured to be taken to hospital.
11. The written report also had remarks that there was no complaint and that the site where the injured fell was dry and had the slippery warning sign in place.
12. The report was stated to have been passed to the (defendant’s) Management Office at 0830 hours the day following the accident.
13. Winson operated a three-shift system : morning shift spanned between 7:30 am and 5:30 pm and manned by 14 cleaners; middle shift spanned between 5:30 pm and 10:30 pm again manned by 14 cleaners; night shift spanned between 10:30 pm and 7:30 am manned by 7 cleaners. According to the requirements of the defendant, Winson had to arrange for cleaners to carry out cleaning procedure at specified locations which included clearing rubbish and dirt and obstacles on the floor, with a view to keeping the mall clean and safe. According to a sign-up roster exhibited (trial bundle 112), the cleaner responsible for cleaning the accident site at the time should be Tang Oi Lin who has left the employment now. From the CCTV footage, it was not possible to confirm the identity of the cleaner in question.
14. Winson’s cleaning performance had been good. DW1 would hold regular monthly meeting with the cleaning supervisor in order to find out if Winson’s performance had met the defendant’s requirements, and to discuss the safety issues of daily operation, case-sharing relating to cleaning work, and how to improve or raise cleaning service standards, etc.
15. DW1 and other management staff would also patrol around within the confines of the mall, in order to make sure that the facilities were kept in proper condition, the place was clean, and that the security and cleaning staff were working efficiently. DW1 when patrolling would pay particular attention to cleaners’ daily work performance and note any safety issues that needed improvement. The defendant had outsourced the security matters to Dragon Guard Security Company. Security staff were responsible for regular patrolling the mall and they kept patrolling record. DW1 and the other management staff did not need to fill in patrolling record.
16. Regarding the yellow warning sign seen on the video, it contained the words in Chinese “小心地滑” and in English “caution wet floor” and a cartoon figure.
17. DW1 was referred to the document known as “Tender No: Q009935 Provision of Comprehensive Cleaning Services For …Luk Yeung Galleria… Particular Specification” (trial bundle 145-185), in particular at 146 which talked about mopping action done by cleaners where it said:-

“Mop – to use a long strand and clean with a bucket of clean water and detergent added. Mop to be rinsed in a bucket of clean water/detergent after every 10m2 of floor space is completed. Water/detergent to be replaced when it becomes dirty.”

1. DW1 said that according to his knowledge, Winson did comply with the requirements specified in the document. Further, DW1 said that from his previous experience, a cleaner would mop up the floor when she saw wetness on it.
2. In general, Winson had been complying with the defendant’s requirements.
3. The floor tiles were made of man-made marble; they *should have* anti-slippery features. However, DW1 acknowledged that he had no expert knowledge in this respect.
4. Referring to the Security Report, the reporting officer Y C Wong was the controller sitting in the control room in the mall. The control room had contact with the security officers by walkie-talkie.
5. The first recipient of the report Connie Lau was a mall affairs officer.
6. The opening hours of the management office for Mondays to Saturdays were 8:30 am to 6:00 pm; 2:00 pm to 6:00 pm for Sundays. Hence, on the day in question, being a weekday, there would have been no inspection/monitoring work by management staff (ie mall affairs officers) of the defendant after 6:00 pm.
7. Recollecting the footage in the video, DW1 acknowledged that the warning sign was placed at the accident spot only about 12 minutes after the accident.
8. When cross-examined about why note 4 of the security report recorded that “the above-mentioned floor surface (meaning the accident spot) was dry and had a caution wet floor sign”, DW1 said the relevant security officer might not have known the exact spot of the accident.
9. DW1 was asked to read notes 3 and 4 together. Note 3 read “H1 (ie the report writer) re-watched CCTV CAM1 that at 20:27 (Hrs) (Miss Chan) fell outside shop S22-23 (Nam Cheung Restaurant)”.
10. It was suggested that when notes 3 and 4 were read together, the report writer must have meant that the spot referred to in note 4 was the accident spot. DW1 was asked if he suspected the report was inaccurate. DW1 said he initially suspected so but then he asked a security staff member (not sure if it was the report writer) who replied that the warning sign was in the vicinity of the accident spot. DW1 believed him.
11. When asked about the photos taken by the security officers such photo-taking action being clearly shown on the video, DW1 said that they did not provide him with photos.
12. When put that there was no caution wet floor warning sign in the vicinity of the accident spot, DW1 said it was correct that the CCTV did not show such a warning sign.
13. It was put to DW1 that after 6:00 pm, the defendant (through the management office) had not taken such steps as it reasonably ought in order to satisfy itself that the work had been properly done. The answer given by DW1 was : not personally.
14. DW1 said that the yellow warning sign that was placed at the accident site was actually a second warning sign; the first yellow sign being at a place beyond the bottom of the screen (this was not within his direct knowledge though).
15. DW1 was then asked about the document with title beginning with “Tender No: Q009935…” again, in particular p 146 of the trial bundle, on the topics of “mop” and “sweep” as actions.
16. It was suggested to DW1 and which he agreed that the normal way of mopping was to do it as per the specification of “mop” on p 146.
17. DW1 agreed that there was no mention of the placing of a warning sign in the specification of “mop”.
18. It was suggested to him and which was disagreed that the mop as shown on the CCTV screen was wet.
19. DW1 also disagreed that the accident site had water and was slippery.
20. DW1 referred to that part of the “Tender No: Q009935…” document at p 164 of the trial bundle at para 14.11 in which it was mentioned that “the Contractor’s safety performance shall be monitored under a Contractor Safety Points Deduction Scheme, in parallel with the Interim Performance Assessment (C42 Form) ……”
21. DW1 also referred to the Scope of Services section (paras 6.1 to 6.13.3) within that document (at trial bundle 149-152). The highlights of this section are in the following paragraphs:-
22. The Service Scope and Standard are set out in Appendix A of the document (para 6.1);
23. The contractor shall appoint a competent supervisor with authorities to receive and enforce instructions given by the Employer [MTR]… this supervisor shall be responsible for ensuring all cleaning works be proceeded strictly in accordance with the contract and to the employer’s satisfaction (para 6.2);
24. The responsibilities of the cleaning staff are laid down in Summaries of Duties (Appendix B). The employer shall have the authority, through the contractor, to terminate the service of any person who is found not suitable for the job and the contractor will have to provide immediate replacement (para 6.3);
25. The contractor shall submit an operational and manpower deployment plan based on the daily work schedule for the employer’s approval before commencement of the Contract (para 6.8);
26. The contractor shall submit to the employer the following documents for inspection purpose:-

* A daily manpower deployment list.
* Daily and monthly reports of the cleaning work done for the preceding day and month. (para 6.9).

1. When asked if Winson would fail the performance standard if the floor was wet-mobbed in the absence of a warning sign at or in the vicinity of the place mobbed, DW1 said yes.
2. It was put to but was denied by DW1 that the defendant had not acted reasonably in selecting Winson as the independent contractor for cleaning services.
3. It was put to but again was denied by DW1 that the defendant had not taken such steps as it reasonably ought in order to satisfy itself that Winson was a comptent contractor.
4. DW1 confirmed that there was no MTR staff at management office after 6:00 pm on all days and during the am on Sundays. During these periods, it would be wholly up to the cleaning foreman and security supervisor to oversee the performance of their respective subordinates. However, there was something called the duty list on which were the names and telephone numbers of management staff whom Winson and Dragon Guard may contact during off-duty hours of management office in case of emergency; where necessary, the management staff member called might return to the shopping mall.
5. DW1 also told the court that there was something known as the checklist which had on it a number of items to be checked and signed when the corresponding jobs had been performed. The foreman also signed after checking it correct.
6. DW1 said that management staff such as himself would conduct random checks to verify that the jobs that were marked done on the checklist were indeed done.
7. DW1 said that Service Scope and Standard at Appendix A (trial bundle 175) to the “Tender No: Q009935…” document was generally followed.
8. DW1 said that the use of the yellow warning sign by cleaners while mopping was something covered by the safety guideline(s) issued by Winson (pursuant to the request of the defendant) and would be dealt with in briefing and education.
9. DW1 also referred to para 7.9 (trial bundle 154) of the said document which says that “All cleaning services provided by the contractor are fully in-line with the requirement as stipulated in the MTRCL’s Cleaning Methodology & Technology Manual and Cleaning Services Templates with their updated versions”.

*DW2 LEE Kam-cheung*

1. DW2 was the mall affairs officer and he was also authorized by the defendant to provide information relating to the accident. Again, he was off-duty when the accident occurred.
2. Dragon Guard’s security guards were divided into two shifts : day shift ran from 8:00 am to 8:00 pm with 8 security guards on duty; night shift ran from 8:00 pm to 8:00 am with 4 security guards on duty. At the time of the accident, there were 4 security guards on duty. Their work included regular fixed-time patrol, paying attention to whether the facilities were properly kept, and providing assistance to customers etc.
3. DW2 produced a duty roster of the security service (trial bundle 92-93) which showed that during the material time, 33040, 33041 and 33049 were among the guards that were on duty.
4. During day shift, the guards would conduct at least 5 times of patrol. During night shift, the guards would conduct at least 4 times of patrol. There was a clocking system in place along the fixed route of patrol. Each tour of patrol would last about an hour.
5. DW2 also produced the patrol report for the day in question (trial bundle 95-103). According to the report, security guard would conduct a patrol at least every two to three hours. The place where the plaintiff fell was situated at the corridor outside the Nam Cheung Restaurant ie a patrol area between step 4 (ST.8 back staircase) and step 5 (male toilet on 2/F). As a result, all security guards when conducting patrol would pass by the accident spot. If the guard on duty had discovered some improper facilities, for example, there were some dirt or obstacles on the floor, they would have to inform the control room at once, and cleaner(s) would be arranged as necessary to go to the scene to clear the dirt or obstacles before the guard could leave. Dragon Guard’s service had been of good quality.
6. As for the defendant’s cleaning contractor Winson, their cleaners would be arranged to conduct cleaning work at fixed positions within the mall. Everyday, the floor of the mall would be patrolled and cleaned by cleaners to avoid unnecessary danger caused by dirt and obstacles on the floor.
7. DW2, together with Mr CW Yung (DW1), took part in the monthly meeting(s) with the security supervisor and the cleaning supervisor; the discussion would include how to improve upon or raise the security and cleaning service quality.
8. DW2 was not helpful in relation to matters not covered in his witness statement.

*Documentary evidence*

1. The parties’ joint position as regards documentary evidence in general was that admissibility of the contents was not challenged on the ground of hearsay but that the court was asked to attach whatever weight to any part of it as it deemed fit.

*Analysis and Discussion*

1. On the **first issue**, the court was assisted by CCTV video in the form of a DVD supplied by the defendant. What could be seen on the video was that there was from time to time a cleaner who was mopping the floor area captured by a fixed camera. In the initial stages, the cleaner carried with her a yellow warning sign which had printed on it warnings of slippery floor in both languages. During these stages, the warning sign would be placed at or near the place she mopped. It is true that from the video, there is no way in which one could see whether it was a wet or dry mob, or whether the mob left a thin layer of water or watery substance on the floor. However, from the customary action of the cleaner regarding the carrying of the yellow “wet-floor” warning sign with her and placing it in the vicinity of where she mopped, one can infer that the mopping action created wet surface deserving of extra attention and caution by the pedestrians.
2. Later on, the warning sign was no longer seen within the four corners of the footage. What can be seen is that at one particular time, the cleaner had mopped a place at almost the centre of the footage; about 2-3 seconds thereafter, the plaintiff (wearing high heel boots) walked across it before anybody else did. It is abundantly clear that she slipped and fell backwards. It ought to be stressed here and now that although, at first blush, she appeared to be walking a little bit fast; in fact, if one compared her pace with those of most other passers-by, they were about the same. I am convinced that the first impression was a result of the angle at which the video was shot. Not long after she fell, a cleaner approached her and so did another lady passer-by. They appeared to exchange some words. Eventually, the plaintiff picked herself up and walked away from the CCTV camera and disappeared.
3. When giving evidence in the witness box, the plaintiff said that when her hand was pressed against the floor as shown on video, she could feel wetness. The evidence fit in well with the inference already mentioned. There was nothing inherently improbable about the evidence. She maintained her stance despite being cross-examined as to the fact that this particular piece of evidence was not mentioned in either of her two witness statements. I also took into account her demeanour when she gave this piece of evidence. I am satisfied that I can give this evidence full weight. In assessing her general credibility, I took into account she did not claim loss of earnings during the 107 days of sick leave nor during the pre-trial period. I also noted her abandonment (midway in the trial) of her initial claim of expenses on employing a part-time helper. None of these matters caused me to doubt her general credibility.
4. From all of these pieces of evidence, I find as a fact that the particular patch of floor in question was wet – in the sense that there was a thin layer of water or slippery substance on the floor. It ought to be mentioned that the floor tiles were made of man-made marble and it was clear from the video that the floor was at all times shiny.
5. On the topic of *res ipsa loquitur*, I have considered the judgments of the Court of Final Appeal in *Frank Yu Yu Kai v Chan Chi Keung* (2009) 12 HKCFAR 705, and *Sanfield Building Contractors Ltd v Li Kai Cheong* (2003) 6 HKCFAR 207, and hold that this doctrine is not applicable in the circumstances of this case.
6. On the **second issue**, for a long time (about 10 minutes) after the plaintiff got up and left, there was no attempt by the cleaner or anybody else to place a yellow warning sign at or near the place of the fall. I consider this unreasonable and indicative of the general poor management of the cleaning services either through lack of proper training or lack of proper supervision (or both). Although there was evidence that the use of the yellow warning sign was covered in briefing for and education of the cleaners, there was no evidence as to the frequency of such briefings or if there was any regular refreshment classes that the cleaners would have to attend. In this respect, I reject the Defence contention that the non-use of the warning sign before the fall was merely a momentary lapse on the part of the particular cleaner. Although it had been suggested by the Defence that there was a yellow warning sign just below the bottom of the screen (and therefore cannot be seen), there was no admissible evidence that it was there. In this respect, even if the hurdle of admissibility could be overcome, I find myself unable to attach any weight to this piece of evidence (located at para 53 above) (see credibility and reliability of DW1 discussed below).
7. The weight of the evidence therefore led me to the conclusion that both shortly before and for more than 10 minutes after the accident, there was no yellow warning sign at or near the place of the fall.
8. I find as a fact that there was insufficient warning to passers-by (and to the plaintiff in particular before her fall) of the hazard inherent in the mopping of the subject area both **before and after** the accident.
9. The cleaner in question either knew or ought to have known that the act of mopping the floor created a danger of possible “slip and fall” to other users of the particular passage and therefore ought to have taken reasonable steps to warn them of it. A reasonable step would have been to place the warning sign at or sufficiently near to the site being mopped. The cleaner had failed to do so in this instance and this has caused the plaintiff’s fall. I find that the cleaner had been negligent in the performance of the cleaning services in that she had failed to take reasonable steps to ensure the safety of passers-by from slipping on the wet floor caused by her mopping action.
10. Since the cleaner was acting in the course of employment, her employer ie the cleaning contractor Winson was vicariously liable for her negligence.
11. On the **third issue**, was the defendant liable under the law of negligence and under Occupier’s Liability Ordinance, Cap 314 ?

*Under the general law of negligence*

1. I start with the general principle as exemplified in *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911, 912, per Lord Goddard:-

“The duty of the shopkeeper in this class 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 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 defendant to explain how it was that the accident happened.”

1. The only evidence of fact came from the video and PW1. Neither the cleaner in question nor any attending security staff had been called as a witness.
2. In this case, the accident had happened otherwise than because of the conduct of the plaintiff (see the issue of contributory negligence below); it does appear that there had been a breach by the defendant of his duty to see that the shop floor was kept reasonably safe.
3. The defendant being the employer can escape liability however if he can prove on the balance of probabilities that he had delegated this duty to an independent contractor and that there was nothing negligent in its act of doing so.
4. If the defendant can do so, then it is not liable because, as a general rule, an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of the work contracted for.
5. It has been said that, in the proper context, the employer’s burden of proof in this respect is the same as the occupier’s burden of proof in the statutory defence under section 3(4)(b) of the Occupiers Liability Ordinance, Cap 314 (more below): per DHCJ To (as he then was) in *Wan Tsz Nok v Hung Fai Electrical Engineering Ltd*, HCPI 1117/2004, at paras 41 to 42.

*Under the Occupier’s Liability Ordinance, Cap 314*

1. There is no dispute that the defendant was at all times the occupier of the premises. Under section 3(1) of Cap 314, an occupier of premises owes the same duty, the “common duty of care”, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
2. Under section 3(2), the common duty of care is 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.
3. Under section 3(4)(b), where the occupier has employed an independent contractor to do the relevant work for him, and damage is caused to a visitor by a danger due to the faulty execution of the work of … maintenance … by the independent contractor, in determining whether the occupier has discharged the common duty of care, the occupier is not to be treated without more as answerable for the danger if (he can show on the balance of probabilities that) in all the circumstances he had acted reasonably in entrusting the work to the independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
4. Three elements have been clearly identified in the above formulation. They are:-
5. The employer/occupier had acted reasonably in entrusting the work to the independent contractor;
6. He had taken such steps (if any) as he reasonably ought to satisfy himself that the contractor was competent; and
7. He had taken such steps (if any) as he reasonably ought to satisfy himself that the work had been properly done.
8. In this case, on those three elements, the defendant had adduced evidence of the process through which the cleaning contractor was engaged, the contractual terms between the parties, and what mechanism there was in existence for supervision of the work of the cleaning contractor or its servants.
9. It is important to remember that it is the defendant which bears the burden of proof under the law of negligence as well as under Cap 314 (see paras 93 to 95 above).
10. It is important also to remember at once that we are in this case not dealing with standard of cleaniness, which no doubt formed the major aspect of the work entrusted, but with an ancillary aspect of the work taken up by the cleaning contractor ie the safety aspect (here, safety not to the cleaners themselves but to the passers-by or users of the shopping mall in question).
11. In none of the written material before me has this aspect been adequately dealt with, if at all. Yes, there were passages in the contractual terms which dealt with safety but they were related to employees’ safety within the framework of a safe system of work; that was all. In this respect, I point to para 8.6 (trial bundle 156-7) of the “Tender No. Q009935…” document with the heading “Training”. For example, at para 8.6.3: “The Contractor shall arrange the following training courses for cleaning staff, which shall include Construction Industry Safety Training Certificate, Certificates for erection of metal scaffolding, [etc]”; and at para 8.6.4: “The Contractor is required to propose training scope for the Employer’s approval and be responsible for the training of all cleaning staff to carry out their duties effectively and safely.”; and at para 8.6.5: “the Contractor shall provide a handy safety instruction which must be kept by each cleaning staff to increase safety consciousness.”; and at para 8.6.6: “Any newly deployed staff must be briefed by the Contractor on the safety requirements, cleaning duties and cleaning quality to be required by the Employer before working on the Premises. Such briefing shall be properly recorded for inspection by the Employer as and when considered necessary.”
12. I turn next to para 14 (trial bundle 163-4) of the same document with the heading “Legislation, Health and Safety Responsibility”, parts of which expressly echoed what has been mentioned in the preceding paragraph of this judgment. Para 14.1 states: “The Contractor is required to comply with the “Safety Rules for Contractors working in MTRCL Managed Properties.” Para 14.2 states: “The Contractor shall provide training to all personnel, which includes occupational safety and health related courses. The training materials are subject to prior approval by the Employer.”
13. Para 14.3 states: “The Contractor shall provide its staff with a handy safety instruction to increase safety consciousness. Any newly deployed staff must be briefed by the Contractor on the safety requirements to be required by the Employer before working on the premises. Such briefing shall be properly recorded for inspection by the Property Manager as and when considered necessary.”
14. Para 14.4 states: “The Contractor shall provide appropriate personal protective equipment (PPE), such as helmet, safety shoes, safety belt, etc to all personnel working on the Estate.”
15. Para 14.5 states: “The Contractor must instruct all its staff to take all safety precaution required in carrying out the work, especially those at high level.”
16. Para 14.6 states: “The Contractor must ensure the erection, maintenance, repair and dismantling of scaffolds, together with necessary safety measures should be done in accordance with the Factories & Industries Undertaking Ordinance (Cap 59)…”
17. Para 14.7 states: “The Contractor must ensure the erection, use and dismantling of the monorail, working platform, gondola or other approved access device for the external wall or high level voids together with the necessary safety measures should be done in full compliance with ……”
18. Para 14.8 states: “The Contractor shall be responsible for the safety of all persons engaged in the execution of work on site. He is liable for the compensation to their employees who suffer in injury or death arising from working in the site areas.”
19. Para 14.9 states: “The Contractor shall inform the Employer immediately of any accident on site. The Contractor shall submit a written report using the Employers’ Form C35 to the Employer’s authorized representative within 24 hours of the occurrence of the accident.”
20. Para 14.11 states: “The Contractor’s safety performance shall be monitored under a Contractor Safety Points Deduction Scheme, in parallel with the Interim Performance Assessment (C42 Form)……”
21. Then we have a whole section under Para 15 (trial bundle 165) which deals with “Contractor Safety Points Deduction Scheme”.
22. All of these cited passages have an unmistakable tone of employees’ safety rather than safety precautions for the benefit of other users of the mall. Para 14.3 above cited comes closest to what DW1 said in his evidence about the use of the yellow warning sign by cleaners while mopping being something covered by the safety guideline(s) issued by Winson (pursuant to the request of the defendant) and would be dealt with in briefing and education. However, it is unfortunate that neither the safety guideline(s), nor the “handy safety instruction” and the briefing record (which should be easy for the defendant to obtain) have been produced in evidence.
23. I find it significant that, despite the availability of a duty list (containing telephone numbers of management staff) for use in emergency that occurs after 6:00 pm, there is no evidence that any management staff of the defendant was informed of the subject incident until the next day. Contrast this with Para 14.9 cited above which requires that the defendant be informed of any accident on site immediately and that a Form C35 be used to report the accident. This absence of immediate notification to the defendant coupled with there being no evidence that the Form C35 had been used reinforces the proposition that the whole of Para 14 deals only with employees’ safety.
24. In this endeavour, this court has not overlooked what is contained in the Letter of Clarification dated 17 February 2010 (trial bundle 143 to 144) issued by the defendant to Winson which had listed the various documents that formed part of the contract to be entered into between the parties. Among the documents is a “Safety Rules for Contractors Working in MTR Corporation Managed Properties (July 2007)”. Unfortunately, it has not been produced at trial so I do not know its contents nor can I speculate as to the same.
25. Another matter which this court has not overlooked is that in another document listed in the letter, entitled “Conditions of Contract for Supply of Services” (trial bundle 186 to 207), at para 27.1 (under the heading “Health, Safety, Security, Interference and Disturbance” (trial bundle 202), it is stated that “The Contractor shall throughout the Contract Period have full regard for the safety of all persons and shall keep the Site in an orderly state conducive to the avoidance of danger to such persons and he shall, without limiting the generality of the foregoing in connection with the Services, provide and maintain at his own cost all lights, guards, fencing, **warning signs** and watchmen when and where necessary or required by the Employer or by any competent statutory or other authority for the protection of the Services or for the safety and convenience of the public or others and where work is being carried on in the hours of darkness shall ensure that all parts of the Site where work is being carried on are so lighted as to ensure the safety of all persons on the Site.” (my emphasis)
26. There are two problems with this clause. First, it is a general boiler-plate clause without any particular reference to the Contractor in its special capacity as a cleaning services provider; indeed a very similar (though not identical) document (trial bundle 248 to 269) bound the security contractor Dragon Guard – with an identical para 27.1 appearing at trial bundle 264. Secondly, there was no evidence to associate the “warning signs” here with the yellow warning sign(s) subject of these proceedings and the court should be slow to speculate one way or the other.
27. As regards the oral evidence of the Defence witnesses, principally that of DW1 Yung, it provided no more than that there had been systematic checking by cleaning foremen of cleaning tasks against checklists filled in by the cleaners; that there was random checking by the defendant’s own management staff within their office hours of the work results against the same checklists; that there were regular periodical meetings between the cleaning contractor and the defendant’s representatives during which matters of concern would be discussed.
28. All of these fell short of covering the safety aspect aforesaid of the work involved.
29. As regards the bare assertion of DW1 that the use of yellow warning sign was something covered in safety guideline(s) and was impressed upon cleaners in briefing and education, I reject this evidence based on my views on the credibility and reliability of DW1 (see below). Even if I was wrong in this assessment of the evidence and that there were such safety guideline(s) and briefing and education, the video clearly showed that the subject cleaner was *habitually* more concerned with the constant cleaniness of the floor than with the safety of passers-by: this indicates that there was something *systemically* wrong with the said briefing and/or education.
30. I do not find DW1 a credible or reliable witness. The reason is that when he was answering questions from the plaintiff’s counsel and from the court during cross-examination regarding a part of the Security Incident Report relating to the report that the subject scene was dry and had in place a “caution wet floor” sign (note 4 on the Report), he was being evasive (see paras 46 to 49 above). It is abundantly clear to the court from seeing the video that the relevant warning sign was placed on the accident scene only 12 minutes after the accident which was at variance with what note 4 purported to say. DW1 testified that he himself laboured under a doubt after he had seen the video and read the report. That is why he raised a query with a security officer (about whose identity he could not be sure); and the answer he got was that the place referred to in note 4 was a place beyond the lower end of the screen. DW1 said he accepted the explanation. But when pressed by the court as to why the dryness or otherwise of that place mattered to the incident, DW1 took a long time to answer and the answer he gave was that the place referred to in note 4 was of wide scope and included the accident spot. The court finds it difficult to accept such evidence.
31. There is therefore little or no evidence before me to show that (a) the defendant had acted reasonably in entrusting the work to the independent contractor; (b) he had taken such steps (if any) as he reasonably ought to satisfy himself that the contractor was competent; and/or (c) he had taken such steps (if any) as he reasonably ought to satisfy himself that the work had been properly done, bearing in mind that here competence and work included issues of safety to the passers-by/users of the shopping mall.
32. In *Hsu Li Yun (the administratrix of the estate of Lee On, the deceased) v Incorporated Owners of Yuen Fat Building* [2000] 1 HKLRD 900, 907, Keith JA, giving the judgment of the Court of Appeal, said, “What, then, was the impact of s 3(4) [of Cap 314] on whether the defendant had, ……, discharged the common duty of care which it owed to …… its visitor? The effect of s 3(4) was described in Clerk & Lindsell, para 10-60 as follows:-

“…where the occupier has (1) acted reasonably in selecting and entrusting work to the independent contractor concerned (2) taken reasonable steps (if possible) to supervise the construction of the work, and (3) used reasonable care to check that the work has been properly done, he will be held to have discharged his common duty of care.” ”

1. One can see that this formulation differs slightly from the actual wordings of s 3(4). From the passage quoted, the following rule of thumb is said to arise : in order to discharge the duty of care at common law and the common duty of care under Cap 314, the occupier has the burden of proof to satisfy that:-
2. The occupier had acted reasonably in selecting and entrusting the work to the independent contractor concerned;
3. The occupier had taken reasonable steps to supervise the performance of the work by the contractor; and
4. The occupier had used reasonable care to check that the work undertaken by the contractor had been properly done.
5. For the same reasons, I do not find the defendant has satisfied any of these criteria.

*Conclusion on liability*

1. I therefore rule that the defendant had not been successful in discharging their burden on the defence either under the law of negligence or under Cap 314.
2. The defendant is therefore liable to the plaintiff for the injury suffered.

*Contributory negligence*

1. Next, I determine the question of contributory negligence. I have considered the authorities urged upon me by the parties. I am of the view that the plaintiff was not contributorily negligent towards causing the damage/injury which she had suffered. In this respect, I note that the evidence which I accept was that the plaintiff took a slight detour to the right when she saw the mopping action of the cleaner a short distance before reaching the accident spot. It shows she had taken precaution for her own safety but unfortunately the danger was further ahead of her at some place about which she could not have been suspicious of any danger.

*Other submissions*

1. The plaintiff has been submitting throughout that the defendant owed the plaintiff a non-delegable duty under the principle espoused in *Penny v Wimbledon Urban District Council* [1896] 1 QB 335 (construction material left on highway) and *Pickard v Smith* (1861) 10 CBNS 470, [1861-73] All ER Rep 204 (trapdoor for downloading coal into cellar accidentally left open), that “when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.”
2. Without deciding on the point because it is unnecessary for me to do so, my preliminary view is that this principle only applies to cases where the *work* itself is inherently dangerous; for if not, it would unnecessarily extend too widely and would extend to cases such as the present one and irrespective of whether the facts happen in a shopping mall, supermarket or hotel.

*Quantum*

1. The plaintiff was aged 46 at time of accident and is now 48. She was educated to F.1 level in Hong Kong. She is married with two children, aged 18 and 22 respectively. She is living with her family.
2. At the time of the accident, she was working as a computer clerk. She resumed full duty after her sick leave expired. Because her duties included lifting heavy object and she felt left wrist pain, she changed her job to become a cashier until she quitted at the end of 2012.
3. The plaintiff seldom took part in sporting or outdoor activities before or after the accident. She is right-handed.

*Medical evidence*

1. After the accident on 24 November 2010, the plaintiff attended AE Department at Yan Chai Hospital for treatment. There was deformity over left wrist. X-ray of left wrist showed fracture. There was fracture of left distal radius confirmed by radiographs. She was admitted to Orthopedics ward for further treatment. Because of the swelling, she was discharged home on 26 November 2010 and readmitted on 29 November 2010 for operative treatment. Open reduction and internal fixation were performed on 1 December 2010 under general anesthesia. She was then discharged home on 3 December 2010. Thereafter, she was followed regularly in the orthopedics out-patient clinic at Yan Chai Hospital. She was put on a course of physiotherapy. Sick leave was granted to her from 24 November 2010 to 9 March 2011 by their department.
2. The plaintiff attended the physiotherapy department for the first time on 20 January 2011. She complained of left wrist pain. There was slight swelling over her left wrist. The range of movement of her right (sic) wrist flexion was 55 degrees and extension was 50 degrees, supination was 80 degrees and pronation was 50 degrees. Physiotherapy of ultrasound, wax therapy, wrist mobilization and strengthening exercises were given to her for improving mobility and muscle strength. She received 5 sessions of treatment and was discharged after 24 February 2011. On her last visit on 24 February, she reported 70% subjective improvement. The range of movement of her left wrist flexion, extension and pronation were improved to 75 degrees. Her handgrip was 28 kg and left hand grip was 20 kg. She was discharged with home exercises in view of satisfactory progress.
3. X-ray taken in March 2013 showed healed fracture left distal radius with implant in-situ.
4. Agreed medical opinion was that the accident was the sole cause of the injury.
5. As of March 2013, the plaintiff still complained of pain on movement, upon exertion and lifting heavy object. Physical examination revealed mild limitation of range of movement of left wrist. Medical opinions agreed that the Plaintiff’s symptoms were justified.
6. Plaintiff’s expert Dr Chak opined that the plaintiff’s left wrist injury had almost reached a stage of maximal medical improvement. Dr Chak opined that she might need to have physiotherapy for strengthening exercise for 3 months. Two sessions per week and each session might cost $500. The total expenses would be around $12,000.
7. Defence expert Dr Ho opined that the plaintiff had reached maximum medical improvement and no further treatment was required. She should perform daily home exercises for her left wrist as previously taught by her physiotherapist.
8. Both experts agreed that the prognosis for a fracture distal radius was expected to be fair.
9. Dr Chak opined that the permanent impairment of whole person should be limited to 3%; while Dr Ho opined that the whole person impairment was 1.5% for mild loss of wrist movement and mild left wrist pain.
10. Dr Chak opined that the loss of earning capacity for party reference was 3%; while Dr Ho opined that that the loss of earning capacity was 1%.
11. Dr Chak opined that based on her then (as of May 2013) wrist condition, the plaintiff should be able to resume her pre-injury job with mild decrease in efficiency. She might have difficulty with lifting heavy object. Dr Chak opined that she should not have problem with her daily activities.
12. Dr Ho opined that the plaintiff should be able to resume her pre-accident job with mild disability only. In the absence of muscle wasting in her left forearm and arm and reasonably good range of wrist movement, she should be able to lift moderately heavy objects. She should have no significant difficulty with daily activities.
13. Both experts agreed that the sick leave received was reasonable and should be endorsed.

*PSLA*

1. The plaintiff asked for PSLA in the amount of $300,000. The defendant said that $200,000 would be the right figure should the court rule against it on liability.
2. I have considered all the authorities on PSLA urged upon me by the parties.
3. In this respect, I agree that most, if not all, of the authorities relied on by the plaintiff displayed more serious injuries than those found in the present case.
4. I found the following four cases referred to by the defendant provided more assistance in my assessment of the correct figure: *Tang Shu Shek v Leung Chi Kit (t/a Leung Pui Form Mould Works) & Anor*, HCPI 219/2002; *Hop Bing Cheung v Lam Yin Tuk trading as Ocean Fast Food & Ors*, DCPI 166/2004; *Mehmood Khalid v Million Harvest Wharves & Logistics Limited & Ors*, HCPI 401/2006; and *Yu Yixin v Leung Chi Tin Andy*, DCPI 1306/2007.
5. I rule that the amount of damages claimed under this head should be $200,000.

*Loss of earning capacity*

1. Originally, the plaintiff wished to claim under the head of “loss of earning capacity” the sum of $72,000 but by the time of the closing submissions, it was certain that she had reduced her claim to $40,000 to $60,000. The claim is made under the principle that the plaintiff ought to be compensated for the added risk of suffering longer periods of unemployment between jobs owing to her handicap in the labour market.
2. The defendant opposed to any such reward by arguing that the plaintiff had failed to satisfy that there would be a real or substantial risk of losing her present job during her working life by reason of the injured wrist and not otherwise.
3. Upon consideration of the evidence, I am with the defendant on this issue and I rule that there should be no damages to be awarded under this head.

*Special damages*

1. The plaintiff and defendant agreed the figure of $1,970 under the head of special damages being the total amount of medical and travelling expenses. This is the figure that I allow.

*Further medical expenses*

1. The plaintiff claims $12,000 under the head of further medical expenses for 24 physiotherapy sessions as recommended by Dr Chak. The Defence says that there should not be any award under this head as Dr Ho said there was no need for further physiotherapy sessions; but even if the defendant was wrong in this respect, they said that there was no good reason why government physiotherapy services could not be engaged in place of private services. The expenses for government services would come down to $1,480.
2. The plaintiff relies on *Choi Sun Hong v China Harbour Enterprise Construction Ltd & Others,* HCPI 1048/2007, at para 145, to say that where claims are made for the cost of future medical treatment, the award can be based on the cost of private or first-class treatment, notwithstanding the fact that all treatment up to the date of trial has been in a public hospital. If what the plaintiff sought to say was that there would be nothing to prevent an award being made on the basis of private or first-class treatment (where the circumstances warranted it) despite the fact that thus far all the treatment had been conducted at a public hospital, then I would respectfully agree with it. In *Choi*, it was viewed that it was not unreasonable for the plaintiff there to seek psychotherapy in a private setting in light of the advantages put into evidence. Here there is no such evidence favouring private as opposed to government services.
3. In *Chum Hok Ching v Chung Lai Ching*, DCPI 887/2011, at para 133, on which the plaintiff also relied, the 2nd plaintiff there had consulted neurologists both in private and public sectors during her treatment; it was thought reasonable for her to continue to receive future medical treatment by a neurologist in the private sector.
4. Here, I agree with the defendant there was no good reason why the plaintiff could not continue with her treatment in the public sector. I therefore allow a claim of $1,480 under this head.

*Summary on damages*

1. The sum awarded under PSLA being $200,000, that awarded under loss of earning capacity being nil, that awarded under special damages being $1,970, and that awarded under future medical expenses being $1,480, the total amount awarded is therefore at $203,450.

*Interest*

1. I award interest on general damages at a rate of 2% per annum from the date of writ to the date of judgment; and interest on special damages at half the judgment rate from the date of the accident to the date of judgment. Interest from the date of judgment shall run at the judgment rate until payment.

*Costs*

1. The general rule is that costs follow the event. I make an order nisi that the defendant shall pay the plaintiff’s costs of this action to be taxed if not agreed with certificate for counsel. The order will be made absolute should there be no application within 14 days of this judgment.

( Isaac Tam )

District Judge

Mr Tim Wong, instructed by Lawrence YW Ng & Co, for the plaintiff

Mr Dennis Law, instructed by Deacons, for the defendant