Chong Kim Beng *v* Lim Ka Poh (trading as Mysteel Engineering Contractor) and others [2015] SGHC 90

Case Number	: DCA No 36 of 2014
Decision Date	: 06 April 2015
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: N Srinivasan and Belinder Kaur Nijar (Hoh Law Corporation) for the appellant; Foo Soon Yien (Bernard & Rada Law Corporation) for the first and second respondents.
Parties	: Chong Kim Beng — Lim Ka Poh (trading as Mysteel Engineering Contractor) and others

Damages – Apportionment

6 April 2015 Judgment reserved.

Woo Bih Li J:

Introduction

1 The appellant is Chong Kim Beng ("Chong"). He is a Malaysian employed as a welder by Mysteel Engineering Contractor ("MEC") sometime in 2011. The first and second respondents, who are Lim Ka Poh and Choo Wooi Chin respectively, were carrying on business under the name of MEC at all material times. Chong was deployed by MEC to work for the third respondent, Chee Seng Engineering Works Pte Ltd ("Chee Seng"), at a workshop at 3 Tuas Drive 1 ("the Site"). On 16 May 2011, Chong's right hand was injured by the blades of a blower fan ("the fan") whilst working at the Site.

2 Chong then filed a claim against the first and second respondents trading as MEC and against Chee Seng for his injuries, economic loss and damages.

3 After a trial, a District Judge ("the DJ") gave oral judgment on 13 February 2014. He granted interlocutory judgment to Chong to the extent of 90% of the damages to be assessed, with Chee Seng bearing 75% and MEC bearing the remaining 15%. Chong was held to be 10% liable for his own negligence. The DJ also clarified on 10 March 2014 that the liability of the defendants was not joint. This meant that MEC was only liable for 15% and not 90% of the damages vis-à-vis Chong.

4 Chong then filed an appeal. His appeal is confined to one aspect of the judgment, which is the DJ's holding that the defendants' liability is not joint. In other words, Chong contends that the defendants' liability is joint such that MEC and Chee Seng are each liable to him for 90% of his claim although as between the defendants, MEC is liable for 15% and Chee Seng is liable for 75%. It should be noted at this juncture that references to "joint liability" in the present case is in fact a reference to "joint and several liability".

5 At the appeal, counsel for Chee Seng did not appear. He had obtained leave to be excused. It appears that Chee Seng is not concerned whether Chong succeeds in his appeal or not although Chee Seng will be bound by the outcome.

6 Counsel for MEC vigorously disputed that there was joint liability. There is no cross-appeal by MEC.

Main issues

7 The first main issue was whether Chong's pleadings allowed him to claim that the liability of the defendants was joint ("the Pleading Issue").

8 The second main issue was whether in fact and in law, the liability of the defendants to Chong was joint ("the Substantive Issue").

The Pleading Issue

9 The DJ's grounds of decision do not deal with the Pleading Issue perhaps because it was not raised before him.

10 MEC argues that it was taken by surprise as there was nothing in the relevant Statement of Claim ("SOC") to suggest that Chong was claiming that the defendants were jointly liable to him. The words "joint and several" were not used in the body of the SOC or in the prayers for relief. Chong accepted that the words "jointly and severally" were not expressly used in the SOC but he argued that the facts on which the claim for joint and several liability is based were pleaded.

11 MEC also argues that if it had known that Chong was claiming on the basis of joint liability of the defendants, it would have taken a number of steps which it did not because it had thought all along that the claim was on the basis of several liability only. Therefore, MEC claims that it would be prejudiced if Chong were allowed to argue for joint liability on the part of the defendants.

12 I am of the view that the facts to establish joint liability were pleaded. First, whether the facts do result in a finding of joint liability is a matter of legal argument. Secondly, although Chong's prayers for relief did not explicitly claim damages against the defendants on the basis of joint and several liability, there is no requirement that the words "joint and several" must be used. Indeed, no such words are used even in the precedent from *Atkin's Encyclopedia of Court Forms in Civil Proceedings* vol 20 (LexisNexis, 2nd Ed, 1993 Issue) which MEC drew my attention to. The precedent states, "[a]nd the Plaintiff claims from one, other or both Defendants damages …". In comparison, Chong's prayer for relief states, "[a]nd the Plaintiff claims …". I do not see a material difference between Chong's prayer for relief and the precedent which MEC was relying on for the present purposes. Indeed, Form 35 of the *Atkin's Encyclopedia of Court Forms in Civil Proceedings* vol 38(1) (LexisNexis, 2nd Ed, 2011 Issue) on joint liability simply states, "[a]nd the Claimant claims …". This is substantially the same as Chong's prayer for relief.

13 Accordingly, the absence of the words "joint and several" in the SOC and in the prayer for relief is not fatal to Chong's claim in the circumstances. Having said that, it is in the interest of solicitors to learn from the present dispute and insert those words when they act for a plaintiff, if that is indeed the basis of the claim, so as to avoid argument in future.

14 MEC's arguments about prejudice are therefore academic because its arguments were made on the premise that Chong's pleadings did not allow Chong to claim that MEC was jointly liable. Nevertheless, I will address MEC's arguments about prejudice. MEC submits that it would have taken some steps, which it did not, had it been aware that Chong was claiming on the basis of joint liability against the defendants.

15 The first argument is that MEC might not have pleaded contributory negligence against Chee Seng since MEC would nevertheless have been jointly liable with Chee Seng to Chong if liability was established against MEC. I do not accept this argument. Even if MEC was jointly liable with Chee Seng to Chong, it was still in MEC's interest to claim contributory negligence against Chee Seng. MEC could not have been certain that just because Chee Seng is not insured, Chee Seng would not be able to pay for its share of the liability. Furthermore, MEC's claim for contributory negligence against Chee Seng is not prejudiced. If MEC had *not* made that claim, that might be prejudice.

16 MEC's second argument is that it might not have gone to trial and might have settled the matter since it would also be held liable for Chee Seng's negligence if there were joint liability. I do not accept this argument. MEC would be held liable on the basis of joint liability only if there was first a finding of liability against MEC and, secondly, if there was a finding that the defendants were jointly liable. Throughout the trial, MEC was contesting all liability on its part. Its entire submission before the DJ was on the basis that it had no liability at all. Hence, it is clear to me that it would still have gone to trial in any event.

17 The third argument is that MEC would have focused its attention on the factual question as to whether the fan was covered or not at the time of the accident. Chong said there was no cover. Chee Seng said there was. I do not accept the third argument. If there was a cover, then Chong's account of the accident in which he said that one of his hands was caught in the fan because there was no cover would be disbelieved and this might well have exonerated both Chee Seng and MEC from liability. If MEC chose not to focus on this factual issue, it was probably because MEC did not believe Chee Seng's version on this point in the first place. In any event, it was not because MEC thought that it had several liability only.

18 MEC's fourth argument is that it would have focused on when Chong came to be at the work site and whether the fan was there before or after Chong commenced work there. This was because the DJ found that MEC, as Chong's employer, was under a duty to carry out a risk assessment exercise of the work site for signs of danger which Chong might be exposed to. I do not accept this argument because MEC did argue at para 197 of its closing submissions before the DJ that "even if the 1st and 2nd Defendant had gone to the site to inspect it and ascertained that the place was safe that day, it is submitted that they would not be able to know where the [fan] would be placed the following day and whether it would be safe". This was a point, which if accepted, would have exonerated MEC from total liability and was already raised by MEC. It was not dependent on Chong's claim for joint liability.

19 The fifth argument is that MEC would have focused on the evidence as to whether MEC had any *locus standi* to be present at the work site during the course of Chong's work. I do not accept this argument. The argument that MEC would not have been allowed to be at the work site would have been relevant to its argument for total denial of liability in any event and was not dependent on Chong's claim for joint liability.

20 MEC's sixth argument is that it would have applied to join ACL Constructions Pte Ltd ("ACL"), the supplier of the fan, as a co-defendant or third party for two reasons. The first would be to ascertain whether MEC would have been allowed to be at the work site to supervise Chong and the second would be to ascertain whether liability should also be apportioned to ACL. The first part of the sixth argument is similar to the fifth argument which I have addressed. The second part of the sixth argument is not logical. Even if MEC's liability was several and not joint, it would still have made sense to join ACL as a defendant or third party *if* ACL was also liable as MEC would not know how the court would apportion liability between MEC, Chee Seng and ACL. It seems to me that the real reason why MEC did not join ACL as a party is that it did not believe that ACL was liable.

21 In MEC's further submissions, it argues that if it had known that Chong's claim was for joint liability, it would have carried out discovery and interrogatories to obtain documents and facts pertaining to the issue of joint liability. It adds that counsel could also have asked more questions in cross-examination of Chong, of MEC, and of Chee Seng. [note: 1]

22 I do not accept that MEC was unaware that Chong's claim was for joint liability. This is especially so in the light of the fact that in MEC's closing submissions before the DJ, it was arguing that it was not liable at all. There was no alternative argument that if it were liable, it should bear only a small part of the liability with Chee Seng bearing the larger part. This omission was telling. If MEC really believed that Chong's claim was only on the basis of several liability against the defendants, MEC would have made this alternative argument.

23 Likewise, in Chong's closing submissions before the DJ, he did not apportion liability as between MEC and Chee Seng. This is consistent with his position that he believed that both were liable to him jointly (and severally). MEC must have realised that this was Chong's position too. Yet it did not protest then that it was being caught by surprise by Chong's closing submissions. I am of the view that MEC did not protest then because it knew all along that Chong was claiming joint liability against the defendants.

The Substantive Issue

24 The DJ was of the view that MEC was the employer of Chong and that MEC was under a duty to take reasonable care for the safety of Chong. The DJ found that MEC had breached its duty of care as it failed to at least carry out a risk assessment exercise for signs of danger that Chong might be exposed to before he commenced work at the site. MEC also failed to provide any effective supervision of Chong's work. [note: 2]

25 The DJ also found that Chee Seng was the occupier of the Site where Chong was working. Chee Seng owed a duty of care to Chong which Chee Seng had breached because Chee Seng failed to take reasonable measures to ensure that the fan had a cover to prevent accidental injury. Chee Seng should also have ensured that the fan was not placed in the way of workers carrying out work at the Site. [note: 3]

26 Accordingly, the DJ found MEC 15% liable and Chee Seng 75%. As stated above, he also found Chong to be 10% liable for his own negligence which I need not elaborate on.

27 Based on the above findings, the DJ concluded that as between MEC and Chee Seng, this was "a situation of different torts producing the same damage". He added that it was "precisely because the same damage was caused by different acts that apportionment of liability as between each defendant *vis-à-vis the plaintiff* is necessary". [note: 4]

28 He also said that: [note: 5]

> … As the nature of the negligent act of each of [sic] Defendants was different, Chong should not pass his risk of recovery against one Defendant to the other. One Defendant should not bear the risk of the failure of the other to satisfy the judgment against it, when their respective wrongdoing was separate and distinct. …

29 I agree that Chong should not pass his risk of recovery against one defendant to the other by

asking the court to make a finding of joint liability if the torts of MEC and Chee Seng were separate and distinct in the first place. That is non-contentious. The question is whether the torts were indeed separate and distinct.

30 Even if MEC and Chee Seng were guilty of different negligent omissions which resulted in Chong's injury, this did not necessarily mean that each respective tort was separate and distinct.

31 Therefore, different negligent conduct may yield a result that both tortfeasors are liable jointly to a plaintiff for the same injury. MEC does not dispute this proposition. However, MEC submits that in order for joint liability to be imposed on both tortfeasors, the conduct of both must have occurred "substantially contemporaneously". MEC argues that its negligence had ended before Chong commenced work at the Site while Chee Seng's negligence continued while Chong was working at the Site. [note: 6]

32 There appears to be some ambiguity in the authorities as to whether substantial contemporaneity is a requirement to find joint liability. *Halsbury's Laws of Singapore* vol 18 (LexisNexis, 2004 Reissue), states at para 240.033, "[i]f each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage". This proposition was accepted by Choor Singh J in *Oli Mohamed v Murphy and another* [1968-1970] SLR(R) 523 ("*Oli Mohamed*") at [10]. That case appears to be the first reported case in local jurisprudence adopting the concept of substantial contemporaneity. To support this proposition, the High Court cited the United Kingdom authorities of *Dingle v Associated Newspapers Ltd and Others* [1961] 2 QB 162 ("*Dingle*") and *Drinkwater and another v Kimber* [1952] 2 QB 281 ("*Drinkwater*"). Both authorities, however, do not in fact stipulate substantial contemporaneity, in the sense of contemporaneous conduct, as an element of joint liability.

33 In *Dingle*, it was stated at 188 that "[w]here injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it".

34 In *Drinkwater*, it was stated by Morris LJ at 292 that:

> … [t]hey were separate tortfeasors whose concurrent acts caused injury to the female plaintiff. By operation of law, once she proved negligence against the defendant, then she could recover from him the full amount of resultant damage suffered. …

35 While Morris LJ did make the factual finding that the tortious acts committed were "concurrent", this did not mean that concurrence or substantial contemporaneity is necessary for establishing joint liability.

36 I come now to some subsequent local authorities. In *Chuang Uming (Pte) Ltd v Setron Ltd and another appeal* [1999] 3 SLR(R) 771 ("*Chuang Uming*"), the Court of Appeal ("CA") made no reference to the requirement of substantial contemporaneity and stated at [51] that to make a finding of joint liability, the damage caused by the parties must be one which forms indivisible parts of the entire damage.

37 In *Wong Jin Fah v L & M Prestressing Pte Ltd and others* [2001] 3 SLR(R) 1 ("*Wong Jin Fah*"), Lai Siu Chiu J cited both *Oli Mohamed* and *Chuang Uming* with approval and concluded at [92] that because the contemporaneous acts of omission of the first, third and fourth defendants caused the indivisible damage to the plaintiff, there was joint and several liability.

3 8 *Wong Jin Fah* was cited with approval by the CA in *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543. However, in holding that there was joint liability on the facts, the CA did not raise the issue of substantial contemporaneity. The CA stated at [157] that "TV Media's actions are clearly a proximate cause of Andrea's damage and it is therefore liable for the whole of that damage."

39 In *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another* [2005] 4 SLR(R) 417, Belinda Ang Saw Ean J held at [164] that because the defendants' separate and independent acts caused one and the same damage to the victims, they were "concurrent tortfeasors [who] each became severally liable for the whole of the damage caused". I make two observations with respect to this holding. First, the learned judge's reference to "several" liability for the whole of the damage caused was in effect a reference to "joint and several" liability. The learned judge was essentially saying that each individual was liable to pay for the entirety of the damage caused. Secondly, her reference to the defendants as "*concurrent* tortfeasors" is not to be construed as being synonymous with tortious acts that are substantially contemporaneous. Rather, "concurrent tortfeasors" is simply a description of tortfeasors who have committed separate and independent acts which have caused the same damage to the victim.

40 This is similarly the view of the learned authors of Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") who state at para 18.025 that several *concurrent* tortfeasors are tortfeasors who "[commit] independent acts which [result] in the *same damage*". [emphasis in original]. Further support for this interpretation may also be found in *Rahman v Arearose Ltd and another* [2001] 1 QB 351 where the court stated at [17] that "[t]ortfeasors are concurrent when their wrongful acts or omissions cause a single indivisible injury."

41 It may therefore be that the requirement of acts to be "substantially contemporaneous" has not received greater scrutiny because, first, it has been conflated with the label "concurrent tortfeasors"—a label which does not actually contemplate that the tortious acts committed be substantially contemporaneous and, secondly, the requirement of substantial contemporaneity has been treated as the equivalent of the requirement that the acts be the proximate cause of the damage.

42 In *The Law of Torts in Singapore*, it is noted at para 18.024 that "[w]here an injury has been inflicted on the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it." The point is made more specifically in W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th Ed, 2010), where it is expressly stated at para 21–2 that:

> … The simplest case of joint and several liability is that of two virtually simultaneous acts of negligence, as where two drivers behave negligently and collide, injuring a passenger in one of the cars or a pedestrian, *but there is no requirement that the acts be simultaneous. … The acts of the two defendants may be separated by a substantial period of time and yet contribute to one, indivisible injury for this purpose*, as where D1 manufactures a dangerous product and D2 uses it without due care years later. …
>
> [emphasis added]

The above passage shows that while acts which are substantially contemporaneous could more readily lead to the conclusion that there is joint liability, this is not a requirement.

43 Therefore, if for example, a worker of one contractor digs a hole on a piece of land and fails to cordon it off or put up warning signs, and another contractor then requires its worker to work at night at the land without providing him with adequate lighting and he falls into the hole and suffers an injury, the first contractor and the second contractor will probably be liable in negligence to the injured worker. Does one then conclude that there is joint liability only if the hole was dug on the same day that the injured worker went to work there at night but not if the hole was dug one week before the injured worker went to work? I think not. Whether the hole was dug on the same day or a week before, the conduct of each contractor which leads to the accident would be the proximate cause of the victim's indivisible injury and will lead to a finding of joint liability. Both omissions are a proximate cause of the injury.

44 I am therefore of the view that substantial contemporaneity, in the sense of contemporaneous conduct, is not a requirement to find joint liability.

45 However, that is not the end of the matter. Although there is no cross-appeal by MEC, it is still for Chong to establish that the conduct of MEC was a proximate cause of his injury as this is a requirement to find joint liability.

46 As mentioned above, the DJ found that MEC did not carry out a risk assessment for signs of danger that Chong might be exposed to at the Site and had failed to provide any effective supervision of Chong's work (see [24] above).

47 I will deal first with MEC's omission to do the risk assessment. Presumably, the DJ meant that MEC did not go to the Site to do the risk assessment. The DJ appears to have assumed two things. First, that MEC was under a duty to carry out such an assessment and, secondly, that the assessment would have revealed a danger which MEC did not address or warn Chong about.

48 The first assumption appears to be based on a decision of the CA. In addition, Chong submits that MEC had a statutory duty to conduct a risk assessment to ensure a safe work environment. I will elaborate on this later.

49 However, even assuming that MEC was indeed under a duty to carry out the risk assessment, it did not necessarily follow that at the time of the assessment, if it had been carried out, such an assessment would have revealed the presence of the fan and that the fan did not have a cover. Chong submits that the primary function of the fan is to blow away smoke and fumes produced when welding work is done. He also submits that according to the evidence of Cheng Choo Seng, a supervisor of Chee Seng, the fan was an integral part of the welding works. If MEC had carried out the risk assessment, it would have at the very least checked the essential and integral equipment, which includes the fan. It follows that MEC would clearly be able to identify that the fan was uncovered and classify it as a grave hazard. [note: 7]

50 This submission assumes one important fact, *ie*, that the fan in question never had a cover all along so that if MEC had undertaken a risk assessment, this fact and its consequent danger would have been discovered by MEC. It appears that the DJ also assumed such a fact.

51 Unfortunately for Chong, there is no evidence to show that the fan had no cover all along. Indeed, in his evidence, Chong said to the contrary: "[p]reviously … there was a cover. But on the day of the accident, I did not take notice whether there was a cover". [note: 8] Chong then said that he did not know whether there was a cover on the fan when he started work. [note: 9]

52 It was not for MEC to prove that if it had undertaken the risk assessment, there would have been a cover on the fan on the day the assessment was conducted. Rather, as mentioned above, it was for Chong to prove that if MEC had undertaken the assessment, it would have discovered that the fan had no cover on the day it did the assessment.

53 Without the appropriate evidence, there was no basis for the DJ to conclude that MEC's omission to do the risk assessment at the Site was a proximate cause of the injury.

54 As for MEC's failure to effectively supervise Chong's work, what should MEC have done specifically by way of supervision that would have avoided the incident? Even though MEC was technically Chong's employer, it appears from the evidence that Chong was being supervised by Chee Seng at the Site. Indeed, in para 46 of the Appellant's Case, Chong submitted that the DJ ought to have found that Chee Seng was Chong's *de facto* employer. Again, Chong did not identify any evidence on the point specifically. The DJ appeared to have assumed that MEC was guilty of failing to effectively supervise Chong's work and that this in turn was a proximate cause of Chong's injury. I am afraid that that is not good enough. Accordingly, there was no basis for the DJ to conclude that MEC's failure to supervise Chong's work was a proximate cause of the injury.

55 In the circumstances, I dismiss Chong's appeal. Although Chong is not successful in his appeal, I order that each side bear his/its own costs of the appeal because most of the time spent on the appeal was on the pleading issue and on the question as to whether the conduct of both MEC and Chong must be substantially contemporaneous. MEC lost on these two points.

56 I add that although my views might have exonerated MEC from any liability whatsoever, MEC continues to bear 15% liability for Chong's damages (which includes his injury) as MEC did not cross-appeal against the DJ's decision

57 I would also like to make the following observations:

(a) On 10 March 2014, the DJ sought to clarify whether his earlier oral judgment on 13 February 2014 meant that the liability of the defendants was joint or only several. He clarified that it was not joint. His reasoning was that he had in his earlier oral judgment apportioned liability between MEC and Chee Seng and in his view, "[a]pportionment of liability by definition is the converse of joint liability. In joint liability, the Defendants are jointly liable for an amount, with no fixed apportionment amongst them."

(b) In my view, these two sentences may cause confusion. While it is true that defendants who are liable jointly to a plaintiff are jointly liable for the same amount to the plaintiff, this does not mean that apportionment of liability between defendants is necessarily the converse of joint liability. In other words, a court may determine that defendants have joint liability to a plaintiff and at the same time apportion liability as between the defendants. The first order determines their liability to the plaintiff and the second order determines their liability as between the defendants themselves. The two orders can co-exist.

(c) Secondly, the DJ appears to have assumed, from a decision by the CA, that because an employer has a duty of care to its employee, it must always carry out a risk assessment of the site conditions before work commences. The duty to carry out such an assessment was mentioned by the CA in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 ("*Chandran*") at [31], but the CA also said at [33] that there may be circumstances where such an assessment need not be conducted. One such example is where an employee is assigned to do sedentary work in a foreign country. The CA also endorsed at [19] the observations of Pearce LJ

in *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110 at pp 121–122, where he said, "… [b]ut if a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap." The duty to conduct a risk assessment has also been statutorily codified under reg 3(1) of the Workplace Safety and Health (Risk Management) Regulations (Cap 354A, Rg 8, 2007 Rev Ed) where it is provided that a risk assessment should be conducted "in relation to the safety and health risks posed to any person who may be affected by his undertaking in the workplace". In *Chandran*, while the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") and the regulations made thereunder were inapplicable on the facts as the negligent conduct had occurred before the Act had come into force, the CA observed at [49] that under the WSHA, the measures to be undertaken by an employer should "ordinarily include" a risk assessment. It is unnecessary for me to discuss further whether a risk assessment must be carried out in all circumstances where the WSHA applies. For the present appeal, I have proceeded on the premise that MEC ought to have undertaken the assessment.

(d) Thirdly, as I have already indicated above, it does not always follow that a breach of a duty has caused the injury or loss in question.

58 I make the above observations to avoid confusion in the law and to emphasize the importance of carefully applying legal propositions and establishing the facts.

[note: 1] 1st and 2nd Respondent's Further Submissions dated 27 March 2015 at para 5.

[note: 2] Grounds of decision ("GD") at [24] and [31].

[note: 3] GD at [20].

[note: 4] GD at [31].

[note: 5] GD at [34].

[note: 6] MEC's Case at para 53.

[note: 7] Appellant's Supplementary Case at paras 8–9.

[note: 8] Notes of Evidence (22 October 2013), p 23 at paras 9–10.

[note: 9] Notes of Evidence (22 October 2013), p 23 at para 20.