IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 271

HC/Registrar's Appeal (State Courts) No 22 of 2016

Between

Minichit Bunhom

… *Appellant*

And

(1) Jazali bin Kastari
(2) Ergo Insurance Pte Ltd (Intervener)

… *Respondents*

In the matter of DC/DC Suit No 1776 of 2015

Between

Minichit Bunhom

… *Plaintiff*

And

Jazali bin Kastari

… *Defendant*

GROUNDS OF DECISION

[Tort] — [Negligence] — [Special damages] — [Medical expenses]

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Introduction

1 In tort law, special damages are meant to compensate an injured party for specifically quantifiable pecuniary loss that has been occasioned by the tortfeasor's conduct. Does the duty of an employer of a foreign worker include having to bear the cost of medical treatment for injuries suffered in an accident in circumstances which create a legal liability in a third party to pay damages? What does "double recovery" mean when determining special damages arising from a personal injury claim where the injured party has not borne and cannot be liable in law to bear the loss? This appeal was brought against the decision of a District Judge in chambers disallowing medical expenses as a head of special damages, and it revolved around these issues.

Background

2 The appellant had brought an action in the District Court claiming, *inter alia*, special damages in the sum of $15,682.97 which was incurred for medical expenses. He was a foreign worker who was involved in a road traffic accident on 8 November 2013, when a lorry driven by the 1st respondent hit a road divider and resulted in him suffering various injuries. The accident occurred in the course of the appellant's employment with KPW Singapore Pte Ltd ("KPW"). KPW paid for the appellant's medical expenses.

3 The 1st respondent was unrepresented and did not participate in the proceedings at all material times. The 2nd respondent, Ergo Insurance Pte Ltd ("Ergo"), is the insurance company which had obtained leave to intervene in the proceedings in the court below. It was not disputed that the 1st respondent was liable for the appellant's injuries and the only issue in contention was how damages would be assessed. At the hearing for assessment of damages ("the AD hearing"), the appellant claimed that he could not afford the medical expenses and KPW had thus paid them "by way of an advance" on his behalf. He therefore submitted that he should be compensated since there was an expectation that he would have to repay KPW.

4 The AD hearing led to an appeal to the District Judge, who found that the 1st respondent was not liable to compensate the appellant for the medical expenses because (a) the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA") imposed a duty on KPW as the employer to bear the cost of medical treatment arising from the accident; (b) it was not open to KPW to delegate this responsibility to the appellant by the extension of a loan with an expectation of repayment; and (c) allowing the claim would result in

double recovery for the appellant. There was no appeal against the District Judge's other findings in respect of various heads of damages.

5 The present appeal to the High Court was brought with the leave of the District Judge and restricted only to the question of whether the appellant was entitled to recover the medical expenses as special damages. Having carefully considered the arguments presented, I was not persuaded that the District Judge had erred and I therefore dismissed the appeal and stated my brief grounds orally. I now set out the full grounds for my decision.

The appellant's submissions

6 On appeal, Mr Simon Yuen ("Mr Yuen"), counsel for the appellant, submitted that the general principle of tort law required that the appellant be compensated for all losses suffered as a result of the negligence of a tortfeasor. In summary, Mr Yuen's arguments were as follows:[1]

a. to disallow the appellant's claims for medical expenses would be neither fair, just nor reasonable, and would lead to a miscarriage of justice. The tortfeasor should not be absolved from his tortious liability just because his victim is an injured foreign worker;

b. the provisions under the EFMA cannot be interpreted to deny the injured foreign worker his rights under common law and to preclude him from exercising his said rights and claiming any particular head of damage. The employer's duties under EFMA should have no bearing on whether the injured foreign worker is allowed to bring a common law claim for damages against a negligent tortfeasor;

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[1] Appellant's skeletal submissions at [11].

c. the issue of double recovery by the employer was irrelevant as this was a suit between the appellant and the respondents, and the employer was not a party to the suit; and

d. the evidence before the court showed that there would be no double recovery by the appellant.

7 Noting that a recent decision of the High Court in *Sun Delong v Teo Poh Sun* [2016] SGHC 129 ("*Sun Delong*") had been adverted to but distinguished by the District Judge, Mr Yuen sought to argue that the District Judge was not entitled to decline to follow this case which was binding on her. Mr Yuen sought to rely on the court's *ratio* in *Sun Delong* where Choo Han Teck J had held that the injured plaintiff-employee was entitled to claim his medical expenses as special damages even though his ex-employer had paid those expenses upfront. Choo J stipulated a condition that the plaintiff was to reimburse his ex-employer.

8 Mr Yuen argued that there was nothing in the EFMA that precluded the injured foreign worker from claiming his medical expenses from the tortfeasor. Mr Yuen submitted that he had a "right to recover these monies from the negligent tortfeasor" and denying him that right would mean that he would be "left out of pocket for these sums, which would be a grave miscarriage of justice".[2]

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[2] Appellant's skeletal submissions at [37].

The 2nd respondent's submissions

9 Mr M P Rai ("Mr Rai"), acting for Ergo, the 2nd respondent, contended on appeal that the District Judge was correct in her finding, for the following key reasons:[3]

a. the EFMA lays down a non-delegable statutory responsibility on the employer to bear all medical expenses of its employee. To delegate or contract it away would be a breach of the conditions of the work permit, contrary to s 22(1)(*a*) of the EFMA.

b. Moreover, the EFMA mandates that the employer obtains a minimum sum insurance to protect itself from potential liability for the medical expenses. The clear statutory intention is for the employer is to bear the full medical expenses of the foreign worker and to claim it from its insurer. It will then be for the insurer to recover its outlay by virtue of subrogation.

c. To allow the employer to circumvent its statutory liability or the clear statutory scheme (like allowing it to pretend that the medical expenses were loans to the employee for which the employee is liable to reimburse to the employer) would be to allow it to act in breach of the law and is void, unenforceable and illegal.

10 Mr Rai supported the District Judge's reference to another High Court case for guidance, namely the decision of *Lee Chiang Theng v Public Prosecutor* [2012] 1 SLR 751 ("*Lee Chiang Theng*") where the scope of employers' duties under the EFMA was discussed by V K Rajah JA (as he

[3] Intervener's/Respondent's skeletal arguments at [44] – [51].

then was). Mr Rai submitted that the District Judge was correct in distinguishing *Sun Delong* on the basis that no reference to *Lee Chiang Theng* was apparently made by the parties in their submissions before Choo J.

11 Mr Rai therefore submitted that to allow recovery in the present case would be to allow the employer to infringe the provisions of the EFMA, delegate his otherwise personal and non-delegable duty and a scenario of double recovery in the event that the employer had claimed or may claim from the mandatory insurance that he had taken out. The appellant was, in any event, under no legal liability to repay KPW as there was no valid cause of action to support any claim by KPW to be reimbursed or indemnified for paying the appellant's medical expenses.

My decision

12 I have reproduced my oral grounds below in full and supplemented it minimally. I have done so only where I feel it necessary to elaborate on certain points or to provide further clarification. The substance of my grounds remains wholly unchanged.

The scheme of the EFMA: Sun Delong and Lee Chiang Theng

13 I noted at the outset that it is common ground that the EFMA is the relevant legislation. The EFMA provides for employers' duties and responsibilities in relation to foreign employees. The tortious compensatory principle where liability is not disputed is well-established: to put an injured plaintiff in a position as if the tort had not been committed. In quantifying special damages, the law seeks to ensure that the victim is not out of pocket and is reasonably compensated in terms of expenses proven to have been incurred.

14 The scheme of EFMA and the relevant EFMA (Work Passes) Regulations 2012 (Cap 91A, S 569/2012) ("the Regulations") place the burden of bearing medical expenses as well as securing medical insurance on the employer, rather than allocating the risk to the employee. Under the Regulations, the employer is required to take out and maintain necessary minimum insurance for the employee with reference to Condition 4, Part IV of the Fourth Schedule of the Regulations which states as follows:

> **Employment**
>
> …
>
> 4. The employer shall purchase and maintain medical insurance with coverage of at least $15,000 per 12-month period of the foreign employee's employment (or for such shorter period where the foreign employee's period of employment is less than 12 months) for the foreign employee's in-patient care and day surgery except as the Controller may otherwise provide by notification in writing. …

15 In addition, the employer must bear the cost of medical expenses incurred by the employee subject to certain express exceptions, with reference to Condition 1, Part III of the Fourth Schedule of the Regulations. The fact that the employee's obligations are expressed as exceptions indicates that the general rule is that the employer of a foreign employee is to be responsible for the provision of his medical treatment. The Condition states as follows:

> **Upkeep, maintenance and well-being**
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> 1. The employer shall be responsible for and bear the costs of the foreign employee's upkeep (excluding the provision of food) and maintenance in Singapore. This includes the provision of medical treatment, except that and subject to paragraphs 1A and 1B, the foreign employee may be made to bear part of any medical costs in excess of the minimum mandatory coverage if –
>
> (*a*) the part of the medical costs to be paid by the foreign employee forms not more than 10% of the employee's fixed monthly salary per month;

> (*b*) the period for which the foreign employee has to pay part of any medical costs must not exceed an aggregate of 6 months of his period of employment with the same employer; and
>
> (*c*) the foreign employee's agreement to pay part of any medical costs is stated explicitly in the foreign employee's employment contract or collective agreement.

It is clear that based on the above, the employer's payment for medical expenses is a non-delegable statutory duty and there can be no expectation of repayment since there is no possibility of a legitimate claim for recovery.

16 The above principles underpin the pivotal issue in this appeal *viz,* whether the District Judge was justified in reaching her conclusion that Choo J's decision in *Sun Delong* does not bind her and in drawing guidance instead from Rajah JA's decision in *Lee Chiang Theng*. In *Sun Delong*, Choo J was however apparently not referred to Condition 4 of the Regulations or to *Lee Chiang Theng*. No reference to either of these aspects appears in Choo J's judgment. The inference is clear: that he did not take them into account whether consciously or otherwise. If it was the former, I would respectfully disagree that these considerations could be lightly disregarded. If it was the latter, then it stood to reason that Choo J may well have come to a different conclusion had these aspects been placed before him.

17 In any event, Choo J's interpretation of the scope of the employer's obligations under the EFMA could be said to be limited to medical treatment in respect of injuries suffered *outside of* the course of employment. In *Sun Delong*, the employee had been knocked down by a lorry when he was cycling across Woodlands Avenue 10. Counsel's submission in *Sun Delong* – that the employer of a foreign employee is obliged to pay for whatever medical treatment the employee undergoes while he is in its employment, even if it arose out of the tortious conduct of a third party – was similarly premised on

the condition that the medical treatment was necessitated by injury that was suffered not in the course of his employment (at [25] of *Sun Delong*). In rejecting counsel's submission and finding that the medical treatment required by the employee in *Sun Delong* fell outside of the employer's obligation to provide, Choo J could not be said to have also definitively found that the employer would not be required to provide medical treatment even if the injury arose *in the course of employment*. In other words, it cannot be assumed that Choo J's observations would have applied with equal weight to the present factual scenario wherein a third party causes the foreign employee's injury but the accident arose *in the course of employment*. I am therefore of the view that the facts of *Sun Delong* can be distinguished from the present case and the District Judge was justified in reaching her conclusion on the same.

18 The observations of Rajah JA in *Lee Chiang Theng* at [11] on the "heavy responsibilities" that employers owe to their foreign workers under the EFMA are instructive and offered useful guidance to the District Judge in interpreting the intent of the EFMA. The intention of the Legislature behind enacting such responsibilities in respect of their foreign employees has been expressed in Parliament as a move to combat a *laissez-faire* approach in our foreign worker policy which would be detrimental to our overall economic progress (see *Singapore Parliamentary Debates, Official Report* (22 May 2007) vol 83 at col 929). Dr Ng Eng Hen, then Minister for Manpower, highlighted the importance of protecting the well-being of foreign workers through imposing conditions on employers for their housing, remuneration *and medical coverage*, so as to maintain the comparative advantage which Singaporean companies enjoy in being able to access foreign manpower. I concurred with the District Judge's reasoning. She found that the employer was responsible for the foreign employee's upkeep and maintenance in

Singapore, and this includes the provision of medical treatment, as set out in Condition 1 of Part IV of the Fourth Schedule of the Regulations. She noted that the employer was also required to purchase and maintain medical insurance for the foreign employee's in-patient care and day surgery (Condition 4 of Part IV of the Fourth Schedule of the Regulations).

19 In my view, the District Judge was properly guided by Rajah JA's clear and unequivocal statement that the EFMA contains an "unambiguous and *non-delegable* legislative framework of employer responsibilities" [emphasis added] (at [12] of *Lee Chiang Theng*). I endorsed her reasoning and conclusion[4] which was essentially as follows. Applying *Lee Chiang Theng* to the present case, KPW must necessarily bear the cost of the appellant's medical treatment arising from the accident; KPW could not seek to delegate its responsibility to the appellant or to the tortfeasor by the extension of a loan to the appellant with an expectation of repayment.

20 In the course of hearing the appeal, it was highlighted to me that Choo J's decision in *Sun Delong* was the subject of a pending appeal to the Court of Appeal. Upon checking the case status in the eLitigation system, I pointed out to the parties that the matter had been settled and a consent order had been approved by the court. From my perusal of the terms of the approved consent order, the parties had agreed that the award of special damages ought not include the sum of medical expenses which Choo J had awarded. Notwithstanding these developments, I made it clear that the manner in which the parties had resolved their issues in *Sun Delong* and specifically come to an agreement that medical expenses ought not to be included in the award was

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4 Brief Reasons for Decision, at [7].

neither relevant nor dispositive. I therefore did not take this into account in arriving at my decision.

Whether the appellant would be left out of pocket

21 I noted that Mr Yuen had submitted that the general principle of tortious compensation dictates that the injured plaintiff cannot be left out of pocket. This is of course well-settled, but I saw no adverse consequence or potential prejudice flowing from the District Judge's ruling. Assuming slightly different facts, where the employer has not paid an employee's medical expenses and refuses or is unable to pay, the employer would not merely be in breach of his statutory duty under the EFMA; in such a scenario, the employee would *not* be denied his claim against the tortfeasor. Otherwise, the employee could conceivably be out of pocket if he has borne those expenses himself upfront. There would in any case also be no issue of double recovery to speak of.

22 On the facts in the present case, KPW paid those expenses for the appellant, as it ought to have done, but had somehow also sought to recover payment from the appellant. Would the appellant be out of pocket if his claim for medical expenses is denied? Clearly and indisputably, the answer is "no", since he had not paid for the medical expenses and was under no legal liability to repay or "indemnify" KPW, his employer, for having paid those expenses in observance of the statutory duty under the EFMA to do so.

Double recovery

23 Having regard to the above considerations, I was in full agreement with the District Judge's reasoning and decision. She was correct to characterise the ruling as necessary to avoid "double recovery" in two senses:

a. first, in respect of the appellant, in the broad sense that the appellant had not borne the medical expenses to begin with, and a ruling that the 1st respondent (the tortfeasor) should also pay him those expenses which had already been paid for by his employer (KPW), these would translate into double (or put another way, additional) recovery for the appellant;

b. second, in respect of the employer (KPW), in the sense that the employer is under a statutory duty to bear the cost of his employee's medical treatment (Condition 1 of Part III of the Fourth Schedule of the Regulations) and also to maintain the necessary minimum medical insurance (Condition 4 of Part IV of the Fourth Schedule of the Regulations); a claim on the insurance policy may validly be made and to order payment of the same amount to the appellant on the condition (or understanding) that he is expected to repay his employer would mean that the employer can benefit from double recovery.

24 Insofar as the medical expenses of a foreign employee may at times exceed the minimum insurance coverage maintained by the employer, I consider that there may be an arguable case, in principle, that the employer should be entitled to claim this sum (which exceeds that covered by insurance) from the tortfeasor. However, unlike the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("WICA") which gives the employer a right to be indemnified by a tortfeasor who is otherwise liable to pay damages (under s 18(1)(*b*) of the WICA) if the employer has paid compensation to the employee under the said Act, the EFMA does not appear to contain any corresponding provision which gives the employer a similar right. For the purposes of the present case, however, and especially given that the parties have not made submissions on this issue, I do not consider it necessary to make a

determination on whether the employer has a right to make a claim against the tortfeasor subsequently for the sum which may exceed that which is covered by insurance.

Policy considerations against "loan" arrangements

25 Finally, I took into account another cogent and compelling argument raised by Mr Rai. The policy considerations should also entail a further dimension: there is no reason why the law should operate to sanction secret or covert "loan" or "advance" arrangements by employers with their employees which are aimed at seeking further recovery notwithstanding the clear scope of the employers' statutory duties under the EFMA. There is no injustice to the employer and no unjust outcome to be redressed.

Conclusion

26 I was not persuaded that there had been any clear error in law or principle in the District Judge's judgment. The appeal was therefore dismissed. After I heard the parties' submissions on costs, I awarded the 2nd respondent their costs of the appeal fixed at $3,000 as well as reasonable disbursements in addition.

See Kee Oon
Judicial Commissioner

Simon Yuen (Legal Clinic LLC)
for the appellant;
Mahendra Prasad Rai (Cooma & Rai)
for the 2nd respondent.
