

DCPI 3725/2019  
[2021] HKDC 1026

**IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
PERSONAL INJURIES ACTION NO 3725 OF 2019**

BETWEEN

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MOK PUI CHE	Plaintiff
the Administratrix of the estate of IP KING TONG, deceased	
and	
KWOK HING ENGINEERING COMPANY (a firm)	1 <sup>st</sup> Defendant
SHEENLUXE DEVELOPMENT LIMITED	2 <sup>nd</sup> Defendant

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Before: His Honour Judge KC Chan in Court

Dates of Hearing: 12-14 January 2021

Date of parties' written closing submissions : 28 January 2021

Date of parties' written submissions in reply : 4 February 2021

Date of Judgment: 20 August 2021

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JUDGMENT  
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1. This case concerns a fatal accident in which the Deceased suffered serious injuries from which he eventually died about two and a half years later. The widow of the Deceased now sues the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant (“**D1**” and “**D2**” respectively, and together “**Ds**”) for negligence and breaches of statutory duties.

*Background and the accident*

2. Mr Ip King Tong (“**the Deceased**”) was born on 1 May 1954. He was aged 60 at the time of the accident. He worked as a wooden formwork worker in the construction industry.

3. On 19 July 2014, the Deceased and his colleague Chan Kam Fai (“**Chan**”) were present at the construction site situated at Lot No 3177 SA RP in DD 120, Sham Chung Tsuen, Tai Tong Road, Yuen Long, on which two 3-storey village houses were being constructed (“**the Site**”).

4. It is common ground that D2 was the principal contractor at the Site and D1 was D2’s sub-contractor having sub-contracted the entire construction work of the 2 houses at the Site.

5. It is also common ground that D1 engaged Chan and the Deceased (“**the Duo**”) to perform the wooden formwork work at the Site, but whether the Duo were engaged as a contractor or as employees of D1 is hotly disputed.

6. At the time of the accident, the concrete structural work of the house in question (“**the House**”) was nearly completed in that the concrete

structure of the ground floor, 1<sup>st</sup> floor and 2<sup>nd</sup> floor levels had been built, but the formwork for constructing the parapet walls and the shelter for the staircase on the roof had not yet been erected.

7. It is not disputed that on 19 July 2014 the Duo arrived at the Site and started to work at about 1250 hours. At the time, there was no one else present or working at the Site. Chan worked on the 2<sup>nd</sup> floor of the House to dismantle the supporting falsework whereas the Deceased went up to the roof. About 20 minutes later at about 1310 hours, Chan suddenly heard a loud “banging” sound coming from the outside. Chan looked down and saw the Deceased lying on the ground outside the House. Chan immediately got down. The Deceased could not answer Chan when asked what had happened.

8. The Deceased was rushed to Tuen Mun Hospital. On the way in the ambulance, the Deceased developed a cardiac arrest. CPR was performed for about 10 minutes and the Deceased was eventually resuscitated. Examinations found that the Deceased sustained left upper ribs fracture, left superior pubic ramus fracture, and he had haemo pneumopericardium and right intra-cranial haemorrhage. The Deceased unfortunately remained in a persistent vegetative state and was hospitalized. He eventually passed away on 14 March 2017.

9. The plaintiff Madam Mok Pui Che is the Deceased’s surviving widow and the Administratrix of his estate. She was the only dependent of the Deceased.

10. On 13 July 2017, the plaintiff commenced HCPI 740 of 2017 against Ds.

11. Based on the defence case and allegations set out below, Ds issued a Third Party Notice against Chan on 3 May 2018. The Third Part Notice was either not served or in any case not pursued by Ds.

12. In September 2019, the action was transferred to the District Court.

*The circumstances of the accident and whether the Deceased was working before he fell*

13. Ds only admitted that the Deceased was found lying on the ground injured and made no admissions as to the circumstances. It is convenient for me at this stage to state my findings in those regards.

14. The following factual matters were, among others, reported in the Accident Report of the Labour Department dated 18 March 2015<sup>1</sup> (“**the Report**”) and shown by the photographs annexed thereto. While not admitted, they are not really serious disputed by Ds, and I find

a. The edges of the roof of the House were totally unfenced.

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<sup>1</sup> P.182-189 of the Trial Bundles

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- b. The distance between the floor of the roof and the ground was 8.25 meters.
- c. Double-row bamboo scaffolding was erected surrounding the House on all sides.
- d. The blood stain on the ground left by the Deceased was measured to be 55 cm away from the façade of the House.
- e. There were “voids” on the scaffolding. Particularly, there was a “void” measuring 95cm x 88cm right above the position of the blood stain on the ground left by the Deceased, meaning and as shown by the photographs, that there were no transoms or short bamboos or a wood plank platform present in the ”void”.
- f. A retractable measuring tape was found near the blood stain, but no hand tools, such as hammer or handsaw was found on the ground.
- g. No safety belt was found in the vicinity where the Deceased lied.
- h. No ink marking for guiding the alignment of formwork erection was found on the floor of the roof. A circular saw and a fan were found on the roof but they were not connected to electric power.

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i. A levelling ruler was found on the roof at a spot at the other side of the House.

j. No independent lifeline was installed “at the external of the [House]”.

15. In the declaration made by Chan to the Labour Department on 7 October 2014<sup>2</sup> (“**Chan’s Declaration**”), he said the Deceased wore on his waist a nail-bag (a bag to hold nails) and that a safety helmet was found 3 to 4 feet from where the Deceased lied on the ground<sup>3</sup>. I accept what Chan declared there and I so find.

16. Regarding the void, Tang Kwok Chiu (“**Tang**”), the responsible partner of D1 and Ds’ only witness, claimed in cross-examination and for the first time that it was not a void where the Deceased fell through and that there should have been a board or boards on the scaffolding which the Deceased knocked off when he fell. The photograph<sup>4</sup> however showed no large board near the vicinity where the Deceased fell, but only a small board, which could not have been placed on the scaffolding as there were no transoms or bamboos seen that could have supported it. Tang was not present at the scene. His such suggestion was clearly his own conjecture and an afterthought. Its possibility is dispelled by the photograph and I reject it.

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<sup>2</sup> P190 to 206 of the Trial Bundles

<sup>3</sup> P195 of the Trial Bundles

<sup>4</sup> Photo 19 at p258 of the Trial Bundles

17. Going back to the Report, it was concluded there that the Deceased might be doing some preparation work on the roof, and in the course of which he somehow fell from the unfenced edge of the roof to the ground through the void. In cross-examination, Tang expressly and clearly confirmed that he no longer disputed that the Deceased fell from the roof in the course of performing his work<sup>5</sup>.

18. Despite that, in his written closing submissions Mr Ko, counsel for Ds, maintained the contention that it is not proved that the Deceased was working on the roof before he fell.

19. Based on the above-mentioned circumstantial matters, the inherent probabilities and Tang's said expressed acceptance, I infer and find on balance of probabilities that the Deceased was performing some preparatory work on the roof and in the course of which he fell from the unfenced edge through the said void onto the ground.

## ***LIABILITY***

### ***Issues on liability***

20. I will start with recording that the following particulars alleged by the plaintiff were either not disputed or not serious disputed, namely that Ds have not

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<sup>5</sup> The questions and answers were:

“Lim: 嗱你而家你唔會再質疑當時傷者阿棠發生意外時係响天台做緊嘢跌落嚟，你吾會再質疑呢樣嘢啊嗎？”

Tang: 係

Lim: 係嘅意思即係你同意吾質疑，啱啊嗎？”

Tang: 係”

- a. conducted any or any sufficient risk assessment in respect of working on the unfenced roof of the House;
- b. given any or any sufficient warnings and/or training and/or supervision to the Deceased;
- c. installed or provided any independent lifeline anywhere and/or such other secure anchorage for the Deceased to fasten a safety harness on and/or any fall arrestor; and/or
- d. installed safety nets along and on the double-row bamboo scaffolding to stop the Deceased from falling all the way to the ground.

21. I pause to note that it is Tang's evidence that (a) safety harnesses were provided by D1 to be tied to the steel reinforce bar ends as anchor points and (b) the temporary work platforms constructed by the Duo for performing their formwork work were part of the safety measures. I will deal with them in the later part of this judgment.

22. The plaintiff's primary case is that D1 was an employer of the Deceased and he has breached its common law duty of care and statutory duties under section 6 of the Occupational Safety and Health Ordinance Cap 509 and regulation 38AA(1) and 38B(1) of the Construction Sites (Safety) Regulations Cap 59I ("**Reg 38AA**" and "**Reg 38B**" respectively). Alternatively, if D1 was not the Deceased's employer, it nevertheless still



has breached Reg 38AA and Reg 38B. The plaintiff's case against D2 is that it has also breached Reg 38AA and Reg 38B, which respectively read:-

**“38AA. Duty of other contractors to ensure safety of places of work**

- (1) Without prejudice to the other provisions of this Part, any contractor who has direct control over any construction work shall, so far as reasonably practicable—
- (a) identify the hazardous conditions of persons working at a height in the construction work;
  - (b) rectify any hazardous conditions of persons working at a height in the construction work; and
  - (c) safeguard any person working at a height in the construction work against all hazardous conditions.”

**“38B. Prevention of falls**

- (1) Subject to paragraphs (2), (3) and (4), the contractor responsible for any construction site shall take adequate steps to prevent any person on the site from falling from a height of 2 metres or more.”

23. The plaintiff also pleaded that Ds have breached the Occupiers' Liability Ordinance Cap 314 (“OLO”).

24. Ds' case, firstly, is that the Deceased was not D1's employee; rather, the Duo worked as a partnership and D1 had engaged them as a contractor to perform the formwork work at the Site for a contractual sum of HK\$85,000 a house. D1 therefore did not owe to the Deceased the duty of care of an employer and section 6 of the Occupational Safety and Health Ordinance Cap 509 was not engaged.

25. Moreover, Ds pleaded<sup>6</sup> that the contract between D1 and the partnership contained, among others, the terms that

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<sup>6</sup> Paragraph 3 of the Defence at p21 to 23 of the Trial Bundles

a. Other than D1 supplying wooden boards and planks used for the erection of the formworks and a double row scaffolding surrounding the exterior of the houses under constructions, all other equipment and materials would be provided by the partnership, including safety equipment;

b. “The Partnership shall devise its own safe system of work and to deploy all necessary measures to comply with all statutory obligations and to ensure the safe execution of the sub-contract works”<sup>7</sup>; and

c. “During the time the Partnership carry out their formworks construction, the Partnership has complete control, occupation and use of the Site”<sup>8</sup>.

26. Ds therefore pleaded that they had delegated the works necessary for the discharge of the statutory duties to the partnership.

27. Ds then pleaded that the accident was caused solely or contributorily by the negligence, breach of the terms of the contract and/or breach of statutory duties by the partnership and the Deceased<sup>9</sup>. In gist, the particulars pleaded was that the partnership and the Deceased failed

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<sup>7</sup> Paragraph 3.3 of the Defence

<sup>8</sup> Paragraph 3.4 of the Defence

<sup>9</sup> Paragraph 9 of the Defence pleaded such allegations against the Deceased, while paragraph 10 of the Defence pleaded, further and in the alternative, such allegations against the Partnership; at p25 to 27 of the Trial Bundles

- a. to install and erect gangways and work platforms before proceeding to work at the edge of the roof;
- b. to put in place, install and use all such safety devices as may be reasonably necessary and in compliance with the statutory obligations before proceeding to work at the edge of the roof;
- c. to call Chan or deploy extra workers to assist him to install and to erect all necessary safety measures before approaching the edge of the roof;
- d. to put on a safety harness; and
- e. generally, to take all such necessary care, attention and precaution when approaching the edge of the roof, and to maintain his own balance.

*Contractor or employee?*

28. The leading authority on whether a worker is an employee or an independent contractor is the Court of Final Appeal's decision in *Poon Chau Nam v Yim Siu Cheung*<sup>10</sup>. The parties relied on different passages in that decision. Mr Lim cited the passage of Cooke J in *Market Investigations Ltd v Minister of Social Security* approved by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* and quoted by Ribeiro PJ in paragraph 17 of that decision. Mr Ko relied on the 8 criteria listed by Woo

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<sup>10</sup> [2007] 1 HKLRD 951

VP in the Court of Appeal and quoted with approval by Ribeiro PJ in paragraph 20 of that decision. Both passages are oft-cited and I do not think need quoting here.

29. I also find myself much guided by what Ribeiro PJ observed in paragraph 18 there:-

“18. The modern approach to the question whether one person is another’s employee is therefore to examine all the features of their relationship against the background of the indicia developed in the abovementioned case-law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked. It involves a nuanced and not a mechanical approach ...”

30. I make the following findings and, with those principles in mind, evaluate them thus.

31. First, this was a small construction project in which D2 contracted the entire construction work to D1. Tang’s evidence was that (a) he used to be a painter by trade before he became a contractor, (b) he had no expertise over other types of construction work, particularly formwork work, and (c) D1 subcontracted all the work out to sub-contractors according to the type of work. The last-mentioned matter was not challenged save of course that D1 sub-contracted the formwork work. I accept Tang’s evidence above mentioned, and so find, save as to whether he subcontracted the formwork work out (which is a matter to be determined now).

32. Second, I accept Tang's evidence, not challenged and I find, that he did not exert control or give day-to-day instructions to Chan and the Deceased as to how they performed the formwork work. I find, as Tang explained, that the wood formwork work was carried in stages, in between which other types of work, like the erection of steel reinforce bars and laying of electric and water pipes and then pouring concrete into the formwork, and then the construction of the scaffolding up one level, and so on. It is Tang's evidence, not disputed by the plaintiff, that in the periods when the other works were being performed along the stages, the Duo might, and often did, work in other construction sites. Tang would liaise with the Duo as to the time they would return to the Site to perform the next stage of formwork work. I thus accept and find that D1 did not exercise any significant degree of control over the formwork work performed by the Duo. As the erection of formwork requires considerable experience and skill, it was therefore not surprising for D1 to leave the work to the Duo, whether he was an employer or the one contracting the work out. Thus, I do not find the fact that D1 did not give day-to-day instructions to the Duo as to how to perform the work particularly indicative one way or the other.

33. Third, Chan said in Chan's Declaration<sup>11</sup>, and I accept, that the Duo decided which time of the day they would start work, had lunch and got off work; and that they also decided themselves as to how to perform their work, including the priority and the sequence of procedures. I would think that these freedoms on the part of the Duo would suggest the relationship was more in the nature of a contractor.

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<sup>11</sup> P192 of the Trial Bundles

34. Fourth, it was Tang's evidence and is common ground that it was agreed that the Duo would be paid HK\$85,000 for the formwork work for each of the 2 houses, and that payment would be made in tranches, that a certain sum would be paid when the formwork work of each floor was completed. I accept Tang's evidence, which was not disputed, and I find, that this was the mode of payment regarding the Duo's work in the Site, as well as their work in the other sites that D1 had engaged them earlier. Employees in the construction trades, I would think, tend to require their wages to be paid in short and regular periods, say, every 7 days, as their engagements were usually casual and payment in regular periods would provide them with the financial security to have their ends meet. A payment arrangement based on the completion of work up to a stage, in my view, tend to suggest a relationship in the nature of a contractor.

35. Fifth, it is common ground that the Duo were to provide all the tools and nails, while D1 would provide all the planks and materials, and as we will see, also the safety harnesses and safety helmets. Tang accepted in cross-examination, which I find, that the costs of electric handsaws (which could often be bought 2<sup>nd</sup> hand), hammers and other tools used by the Duo were not much. I therefore do not find the provision of equipment or materials particularly indicative of the nature of the relationship.

36. Sixth, Tang's evidence was, and not challenged, and I agree, that under the remuneration arrangement agreed, the faster and more efficient the Duo worked, the more their own "profit" would be. In other words, the savings in time and effort so achieved would not be inured to the benefit of D1, but to the Duo.

37. Seventh and importantly, it was declared by Tang in his declaration made to the Labour Department on 21 October 2014<sup>12</sup> (“**Tang’s Declaration**”) to the effect, and repeated in his witness statement<sup>13</sup>, and repeated again in his supplemental witness statement<sup>14</sup>, that occasionally the Duo would engage casual workers to help with the formwork work, and the Duo would pay the casual worker his wages and that was a matter arranged by the Duo and Tang would not enquire or question them the arrangement. As this was not challenged in the cross-examination of Tang, nor disputed by the plaintiff by any evidence or materials proffered, I so find. This in my view is very indicative that the Duo was carrying out the formwork work at the Site on their own account, rather than carrying on the business of D1.

38. Eighth, I also have regard that in Chan’s Declaration, he said the following<sup>15</sup> which, on a fair reading, tend to show that Chan’s view of the relationship was one of a contractor and not employees.

“ 問(4)： 你與傷者在該工程項目上有何關係？

答(4)： 大家都是釘板師傅，一起拍檔在該地盤做釘板工作，由我與傷者負責整棟丁屋的釘板項目，而該釘板項目是由二判鄧國超把釘板工程給我倆來承做，而整棟丁屋的釘板工程費用是\$85,000 元，但我倆與二判鄧國超是沒有簽訂任何工程合約，一切都以口頭協議作實。”

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<sup>12</sup> P211 of the Trial Bundles

<sup>13</sup> Paragraph 9 at p116 of the Trial Bundles

<sup>14</sup> Paragraph 3 at p125 of the Trial Bundles

<sup>15</sup> P191 of the Trial Bundles

39. The plaintiff placed heavy reliance on the Form 2 dated 30 August 2014 submitted by D1<sup>16</sup>. In it, D1 described the Deceased as “僱員”, and regarding the amount of salary, stated “因非合約形式，沒有固定薪金” and “沒有底薪”. The term “僱員” and the statement there about the salary clearly indicated, prima facie, that at the time D1 regarded the Deceased as an employee. Tang was heavily and effectively cross-examined on the Form 2 by Mr Lim. I accept that Tang has given inconsistent explanations when he first said that it was a staff of the Labour Department who filled in Form 2 for him, and who disregarded him and filled in “僱員” when he told him it was “判頭”; later on in his cross-examination Tang said and confirmed that it was his son that filled in Form 2. When confronted with the discrepancy, he then said essentially that he could not remember. I do not accept his such explanation. I however accept his evidence that it was the first time in all these years that he had to deal with an industrial accident, that he was only educated up to primary school. I also note that in Tang’s Declaration, he corrected himself and clearly stated that the Duo were sub-contractors. My impression was that Tang was a clumsy, unsophisticated and unarticulated witness. I accept that he stated the Deceased was “僱員” in Form 2 when he did not fully appreciate the difference or implications between the 2 types of relationships. In the circumstances, I do not hold what he stated in Form 2 as a full admission, but would regard it as one of the matters to be considered.

40. Looking at and evaluating as indicia all the background and factual matters as detailed above, including what D1 stated in Form 2, I

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<sup>16</sup> P220-225 of the Trial Bundles



conclude and hold in the round that the Duo were engaged by D1 as a contractor, and not as employees, to perform the formwork work at the Site.

41. It follows that I find that D1 did not owe to the Deceased the duties of care of an employer, and also find that section 6 of the Occupational Safety and Health Ordinance Cap 509 was not engaged.

*The alleged contractual terms and delegation of duties by Ds to the Duo*

42. The next question is: was there such terms in the contract between the Duo and D1 as alleged by Ds and as set out in paragraph 25 above?

43. It is common ground that the contract was made orally. As mentioned, it was D1's case that the oral agreement was reached on an occasion when Tang and the Duo were physically present at the Site. The onus of proving the existence of the alleged terms indisputably is on Ds.

44. As explained below, I have no hesitation in finding that Ds have failed to prove that the alleged terms were agreed as part of the contract.

45. To begin with, I will consider the evidence given by Tang in his witness statements regarding the contents of the contract and how they were agreed. I will quote in full the parts in his witness statements that might have a bearing on these subjects, as follows:-

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- “8. 我與他們兩人沒有簽訂合約，一切以口頭協議作實，而該口頭協議是在開工前本人、陳及葉在該地盤一起訂立，當時三人都在地盤現場。釘板工程的基本工程費是港幣八萬五千元。我會按工程進度，及應他們要求以現金分期支付給他們。...
9. 本人與他們合作興建過約七間村屋。一貫都是用這個關係合作，...
- ...
11. 做這些丁屋建築工程我會分判給不同工種的分判商，如扎鐵、石屎、門、窗及裝修等等的不同分判商。所謂工程的釘板分判，除了此實質的釘板工程外，他們的工程項目亦包括安裝所有石屎釘板工序時所需的臨時安全措施，負責該村屋的圍板工序。在該工程開始前及在施工期間，我會以口頭的形式及以工程圖則告知他們要做的範圍，至於安全的措施因為要配合他們的施工方法及時序，所以要由他們自己決定。
12. 他們所使用的工具都是由他們兩人自行安排，包括電鋸、鋸仔、水平尺、墨斗等都是他們的。而釘、螺絲等五金材料亦都是他們提供。至於木板、木方等建築材料則由我提供。我亦提供建築物四邊的棚架和他們所用的防墮救生帶。
13. 我作出這樣安排的原因是他們二人在釘板工程的作業方式對如何安排安全措施有直接關係。
- ...
15. 用那一種方法去做一個石屎模，會對在那些位置何時加設安全措施是不同的。安全措施在工程項目中是“臨時工程”，在施工期間會不停的安裝、改動和減少。所以當他們決定用那種方法去做時，他們要自己視乎施工方法及進度來決定如何及何時加設安全措施。
16. 因為我已經提供木方及木板，他們只需要用我提供的木方連接着建築物的固定點上，將另一端放在外牆棚架的橫樑上，並綁好固定位置，就可以做到一個

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安全工作台底部的支撐，在上面放上木板就會做到一個安全的工作台，這是他們的責任。”<sup>17</sup>

“3. 這港幣 85,000 元的費用是分判合約的總數。除了我提供的木板和基本安全設備，例如安全帽、安全帶、外牆竹棚和室內金屬棚之外，他們需要自己負責其他支出，例如五金配件 ...”<sup>18</sup>

46. In paragraph 8 above quoted, Tang talked about the agreement reached orally. What was said there however was that the price of Hk\$85,000 was agreed. He then went on in paragraph 9 that D1 had previously engaged the Duo to perform the formwork work of 7 houses and that “the working relationship” had consistently been the same.

47. In paragraph 11 quoted above, Tang said “所謂工程的釘板分判，... 他們的工程項目亦包括安裝所有石屎釘板工序時所需的臨時安全措施” (my emphasis), which meant that the “**so-called**” formwork work would include the installation of the “temporary safety measures”. I note that it was not said that such was expressly agreed, but only that such was **regarded** as part of the work, but without giving the reason why it was so regarded. In paragraphs 15 and 16 quoted above, Tang basically said that the “temporary safety measures” he referred to earlier in his witness statement was the temporary “safety” work platforms that the Duo would construct along the progress of the formwork work.

48. I pause to note that on a fair reading of the above quoted passages, there was no evidence, not to say clear and direct evidence, as to what the contents of the conversations were wherein the alleged term,

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<sup>17</sup> Tang’s witness statement at p116 to 119 of the Trial Bundles

<sup>18</sup> Tang’s supplemental witness statement at p125 of the Trial Bundles

namely “The partnership shall devise its own safe system of work and to deploy all necessary measures to comply with all statutory obligations and to ensure the safe execution of the sub-contract works”, was agreed, and as to what Chan and/or the Deceased had said whereby their agreement to the alleged term was objectively communicated.

49. In cross-examination, Tang was pressed to tell the court what the contents of the conversation were whereby such alleged terms were agreed. He hesitated much and was clearly unable to do so. When further pressed as to what was agreed in regard to the provision of safety measures, he said, as he did in his witness statements, that the safety harnesses and safety helmets were to be, and indeed were provided by D1, and then he alluded to in detail the construction of the temporary working platforms that the Duo had to make to enable them to perform their work along the way.

50. As I understand it and put simply, the Duo would use the wood and planks supplied by D1 to construct temporary platform(s) between the exterior of the House and the scaffolding to enable them to erect such part of the formwork, which platform they would dismantle and make another one at the appropriate spot where the formwork would progress to. Tang emphasized that it was an integral part of the formwork work agreed to be performed by the Duo, which Mr Lim for the plaintiff did not dispute. When asked, Tang confirmed that he was equating the temporary work platform as the safety measures which Ds alleged the Duo had agreed to provide. Therefore and essentially, Tang was trying to put a “safety” spin on these temporary work platforms.

51. Without hesitation, I reject Tang's such assertion and argument. I completely fail to see any basis at all to connect the construction of these temporary platforms by the Duo as part of integral procedure to performing the formwork work to there being a contractual term whereby they had agreed "to devise its own safe system of work and to deploy all necessary measures to comply with all statutory obligations". I find it a disingenuous, totally unreasonable and ridiculous excuse.

52. Moreover, I also note and place weight on the fact that it is Ds' evidence in Tang's witness statements and in his oral evidence that D1 indeed agreed to, and did actually provide, the harnesses and the safety helmets. This is evidently **contradictory** to Ds' own pleaded case that the contractual term was that the Duo would provide the safety equipment.

53. Furthermore, it is common ground that before the accident, the Duo had been engaged by D1 to perform formwork work to build 7 such houses. The general tenor of Tang's evidence was clearly that they had already established a *modus operandi* by the time of working at the Site. In the circumstances, had there really been any agreement of the terms now alleged, I would think it highly probable that such terms would have already been discussed and agreed on previous occasions, and highly improbable that such alleged terms were only discussed and agreed on this occasion and not any occasion prior.

54. In the premises and as said, I find that Ds have completely failed to prove that the parties have agreed to the alleged terms.

55. As I find against the existence of such alleged contract terms, I also find against Ds' case that they have by contract delegated to the Duo the works necessary for the discharge of Ds' statutory duties. Having rejected Ds' case of delegation as a matter of factual finding, I find it not necessary to further deal with counsel's submissions as to whether as a matter of law the statutory duties are non-delegable.

*Clear breach of statutory duties by D1 and D2*

56. In pleadings, Ds asserted that the Duo had "complete control, occupation and use of the Site". There was no evidence to that effect in Tang's witness statements or any given in his oral evidence. Rather, Tang's evidence was that he frequently, if not daily, visited the Site to see if everything was alright and that at different stages intermittent with the formwork work, other contractors would perform work at the Site, such as erecting steel reinforce bars, laying electrical and water pipes inside the formwork before concrete was poured and the pouring of concrete and so forth. I thus find the plea not proved.

57. As it is otherwise not disputed, I find that D2 was the contractor responsible for the Site. In the premises, I also find D1 was the contractor responsible for the Site and at the material time having direct control of the construction work there.

58. For completeness, I would mention that Tang's evidence was that the harnesses were provided by D1. They were depicted in the photographs<sup>19</sup>. It can be seen that the metal buckles on the harness were

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<sup>19</sup> P259-261 of the Trial Bundles

well rusted, the rope short and at the end of the rope was a tiny eyelet. In cross-examination, Tang said for the first time that workers would fasten the rope to the protruded ends of steel reinforce bars as anchor points. He agreed with Mr Lim that the rope would have been too short and would restrict movement of the worker wearing the harness. However, it was never pleaded by Ds that they had put in place safeguards or adequate measures to prevent a fall from height or, more particularly, that such safeguards and measures were provided in the manner as now said by Tang. The plaintiff therefore was never alerted to prepare her case to contest that allegation, including contesting that the harness itself was not safe for use or that the system or measure was not a safe one. I therefore refuse to entertain such a case or such allegations so put forth for the first time.

59. It is submitted by Mr Ko that there was no evidence showing how and why the Deceased fell, it was therefore not established that “it was the Defendants’ breach of duty that caused the accident”<sup>20</sup>. I must reject that submission. It is evident that Reg 38AA and Reg 38B were enacted with accidents in view, however caused, whether it be caused by a mishap, an inadvertence, a mis-step or even negligence, as the clear objective is to provide protection to workers from injury as a result of falls by placing the onus on the contractors to see to it that there would be put in place such safeguards and adequate steps **to prevent**. Thus, I accept the submission of Mr Lim that the pertinent question to ask on causation is: had appropriate safeguards and adequate steps been put in place, would the accident have been prevented? I have no hesitation to hold that had an independent lifeline and the appropriate harness been provided and/or a safety net been

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<sup>20</sup> Paragraph 22 of Ds’ written closing submissions

placed and secured on the scaffolding, the accident or injury to the Deceased could have been prevented.

60. I therefore find that D1 has breached Reg 38AA and Reg 38B and D2 has breached Reg 38B.

*Contributory negligence / breach of statutory duties by the Deceased?*

61. The plaintiff objected on a pleading point that Ds should not be allowed to run a case that the Deceased had contributed to the accident or injury because the Deceased has also breached Reg 38AA and Reg 38B. The objection was that the specific statutory provisions, namely Reg 38AA and Reg 38B, had not been expressly referred to in paragraphs 9 and 10 of the Defence.

62. While generally, a party alleging that the other party has breached a statutory provision must plead what the specific statutory provision is and in what way it has been breached so as to inform the other for him to be in a position to respond.

63. Having considered parties' submissions, I am persuaded by and accept Mr Ko's submissions that (a) paragraphs 9 and 10 of the Defence expressly referred and pleaded to paragraphs 7, 8 and 9 of the Statement of Claim in which paragraphs the plaintiff respectively pleaded the common duty of care, Reg 38AA and Reg 38B and the OLO and how they were breached by Ds, and (b) paragraphs 9 and 10 of the Defence first traversed the said 3 paragraphs of the Statement of Claim and then pleaded that if the plaintiff's case were established, then the Deceased also



contributorily breached and/or was contributorily negligent, (c) on a fair reading of paragraphs 9 and 10 of the Defence, it is clear that the statutory provisions referred to were those pleaded in paragraphs 8 and 9 of the Statement of Claim, and (d) had it not been clear as aforesaid, the plaintiff would have sought particulars, which she has not. I therefore rule that the plaintiff has been adequately informed in the Defence of Ds' case that they were alleging that the Deceased had also breached Reg 38AA and Reg 38B. I thus rule against the plaintiff's objection.

64. As the Duo were together a sub-contractor of D1 at the Site, I hold that they were a "contractor who has direct control over any construction work" within the meaning of Reg 38AA in that they had direct control over the formwork work at the Site. Regarding Reg 38B, it was not pursued at trial that the Deceased was the contractor responsible for the Site within the meaning of Reg 38B.

65. Under Reg 38AA, the Deceased had a statutory duty, so far as reasonably practicable, to rectify any hazardous conditions of persons working at a height in the construction work and to safeguard any person working at a height in the construction work against all hazardous conditions. Any person evidently also included the Deceased himself.

66. I have already set out the particulars of breach alleged by Ds against the Deceased in paragraph 27 above, and will consider them next.

67. The first breach particularized was that the Deceased failed to install or erect gangways and working platforms using the wood and plank supplied by D1. As explained above, the installation of the platform was

an integral procedure of the formwork work itself. It was in my view **not** a measure to rectify the hazardous condition or a safeguard against any worker from falling. More important still, the formwork work on the roof was in a preparatory stage and the working platform was not yet built, and as can be seen from the photographs, the installation of the working platform itself at the roof level already involved the Deceased working very close to the edge of the roof, therefore the risk of falling. Therefore, on present facts, the installation of the platform was neither here nor there insofar as it is alleged that it was a breach on the part of the Deceased.

68.            Apart from the installing of the temporary working platforms, Ds have not advanced other allegations, or proffered any evidence, as to what other “all such safety devices as may be reasonably necessary”, was which was the Deceased’s duty, and within his power, to put in place.

69.            The plaintiff’s case, which I accept, is that the reasonably practical means to rectify the hazardous condition and to safeguard from it, and which would have prevented the accident or the injury, were the installation of independent lifelines and safety nets on the scaffolding.

70.            It was the evidence of Tang, which I accept, that the structure of the House was being built in stages, floor by floor from the lower to the higher, through the erection of formwork and the forming of the concrete structures thereby. Therefore, it was not practical to install independent lifelines on the formwork (which was the very structure the Duo was erecting). It was also not practical to install the independent lifelines on the solidified concrete, which necessarily would be below, rather than above, where the Duo would work. Thus, though it has not been canvassed

in detail in evidence, it seems to me abundantly clear that the independent lifelines should be secured to the scaffolding.

71. Moreover, it was the evidence of Tang, which I accept, that scaffolding was also erected stage by stage in that after the concrete structure of one floor of the House was constructed, the scaffolding workers would come to the Site to add a higher level of scaffolding to facilitate the formwork work (and maybe other works as well) for building the next higher floor to proceed. Thus, it seems to me that it was reasonably practical to have the scaffolding workers, when they came to erect the next level scaffolding, to install at the same time the independent lifelines as well as safety nets along the level below where the concrete had already been poured.

72. It was Tang's evidence, which I also accept, that the scaffolding work contractor was engaged and paid by D1. D1 therefore had control over the erection of the scaffoldings. The Duo, on the other hand evidently had no, and there was no evidence to suggest they had any, control over the scaffolding work. Therefore, D1 could and should have instructed or caused the scaffolding to be built to such specification so that (a) independent lifelines could and would have been secured to the scaffolding, and (b) safety nets could and would have been secured at the appropriate level, so as to effectively safeguard against danger and hazard of any person working in the Site from falling from a height. I so find on matters set out in this paragraph.

73. Noteworthily, it was the evidence of Tang that after the construction of the concrete structure was completed. The original bamboo

scaffolding would be rebuilt such that along each floor a continuous bamboo platform surrounding the House would be erected such that the renovation workers would be able to work on the exterior of the House safely. Such evidence reinforced the point that had D1 been minded to do so, it was within his power and control to rectify the hazard, provide safeguards and adequate measures to prevent falls.

74. In the premises, I find it not proved that the Deceased had failed to put in place, install and use all safety devices, as I hold that it was in the power and control of D1, and not the Deceased, to so install the independent lifelines and the safety nets on the scaffolding.

75. I agree with Mr Lim's submission that the complaint against the Deceased for failing to put on a safety harness was an empty one as no independent lifelines were provided for the harness to be secured on.

76. I also do not find the allegation that the Deceased failed to call upon the assistance of Chan has substance, as there was no evidence whatsoever to show that the Deceased fell while performing an operation which could have used the assistance of Chan and that had he called for and obtained such assistance, the Deceased would not have fallen. All these are matters of pure conjecture. I hold this allegation not proved.

77. However, as has been submitted in the plaintiff's case against Ds, the statutory duty under Reg 38AA was non-delegable. Moreover, the duty imposed by Reg 38AA is to rectify, which means to set straight, to amend and remedy. Therefore, in my view, though it was not within the power and control of the Deceased to instruct the scaffolding workers to

install the independent lifelines and the safety nets on the scaffolding, there remained a duty on his part to follow up with D1, so far as reasonably practical, by say, reminding, chasing after and even insisting, to ensure that D1 would make it happen. The evidence before me is that the Deceased had not done any of these or any other thing to so ensure. I thus find that the Deceased had breached the duty imposed upon him by Reg 38AA in this regard.

78. To apportion the responsibility between Ds and the Deceased, I will take into account the blameworthiness and the causative potency of their respective breaches (*Law Ping Leung v Ng Sze Pong*<sup>21</sup>, *Liao Kuo Chun v Win Capital (HK) Ltd*<sup>22</sup>). By reason of the matters I allude to above, in my view the Deceased was much less blameworthy and his aforesaid breach had much less causative relevance to the accident and injury. Overall, I consider it just and appropriate to attribute only 10% of the responsibility for the accident and injury to the contributory breach of the Deceased.

79. Ds also alleged contributory negligence against the Deceased for breaching his common law duty in taking care of his own safety generally. As explained above, I do not find proved any of the allegations of breach, save the breach set out in paragraph 77 above. Those aside, it is also alleged that the Deceased fell because he had failed to maintain his balance. There is no evidence on that, and it is a matter of pure conjecture, which I do not accept. Mr Ko then sought to argue along the line of the application of the maxim *res ipsa loquitur* to say that the Deceased would

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<sup>21</sup> [2009] 5 HKLRD 426

<sup>22</sup> [2010] 4 HKLRD 257

not have fallen without negligence on his part. I do not accept the argument as indisputably the formwork work on the roof at the Site intrinsically entailed a not insignificant degree of risk of falling, and therefore I do not think that it can be properly or reasonably inferred that the Deceased would not have fallen but for his own carelessness. Even if I were wrong on this, in the circumstances I would not have held that he was contributory negligent any more than the apportionment of responsibility I hold regarding his breach of the statutory duty, namely, 10%.

*Conclusion on liability*

80. In the premises, I find Ds 90% liable for the accident and injury to the Deceased.

***QUANTUM***

*Agreed items, disputed items*

81. The parties have agreed on the following items and amounts, namely, (a) the award for pain, suffering and loss of amenities at **HK\$500,000**, (b) bereavement at **HK\$231,000**, and (c) funeral expenses, medical expenses, medical consumables and supplies totalling **HK\$63,562.30**<sup>23</sup>.

82. The following therefore would need to be adjudicated and assessed:-

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<sup>23</sup> Listed at p309-312 of the Trial Bundles

- a. The Deceased pre-trial loss of earnings from the date of accident (19 July 2014) to the date he passed away (14 March 2017);
- b. Loss of dependency from 15 March 2017 onwards until the Deceased would have retired;
- c. Loss of accumulation of wealth;
- d. Loss of service; and
- e. Costs of care, including travelling expenses to and from hospital.

*The average monthly earning that the Deceased would have fetched before he died and the notional average monthly earning thereafter*

83. The plaintiff's case is that the Deceased was earning on average HK\$35,000 a month immediately before the accident. It is also the plaintiff's case that the Deceased would have retired on 1 May 2019 when he would have attained the age of 65.

84. In the Answer to the Revised Statement of Damages<sup>24</sup>, Ds calculated the Deceased's average monthly income immediately before the accident (a) on the basis that the Deceased only earned income from his contractual work with D1, (b) using the figures reported in the Letter (defined below), (c) excluding sum of HK\$25,600 paid by D1 to the

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<sup>24</sup> Paragraphs 9 to 14 of Ds' Answer to Revised Statement of Damages

plaintiff after the accident, and (d) by using a period of 13.5 months as the relevant period of calculation, and came up with a total amount of HK\$220,000 for that period of 13.5 months. Ds then deducted notional expenses at 12.5% on average, and arrived at a figure of average monthly income at HK\$14,259.30. Mr Ko in his closing submissions said little in addition to what was said in the Answer.

85. It was not explained and I cannot see any reason why the 13.5 months should be the relevant period. There is no reason to exclude the said sum of HK\$25,600 paid to the plaintiff as Tang said that it was payment of the balance of the contractual sum owed to the Deceased.

86. Moreover, Ds contended that from April 2013 onwards the Deceased only received income from D1 based on the information reported in the letter from the Inland Revenue Department (“**IRD**”) dated 8 February 2018<sup>25</sup> (“**the Letter**”). The Letter reported that “According to the information available to the Department”, the Deceased received sub-contractor’s fee in the sum of HK\$120,000 from D1 in the tax year 2013/2014 and sub-contractor’s fee in the sum of HK\$125,600 from D1 in the tax year 2014/2015. The Letter did not report other income in that period.

87. The Letter stated clearly that it reported those incomes from information available to IRD. According to Tang, the earnings reported in the Letter were reported to the IRD by D1. The information reported in the Letter therefore was not obtained from the tax returns filed by the Deceased. Indeed, apparently the Deceased had not filed any tax returns

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<sup>25</sup> P283 of the Trial Bundles



at all. I would thus only view the Letter as only a piece of evidence to be considered, among others, regarding the Deceased's income. I do not accept that the information reported in the Letter is conclusive, or even reliable, evidence of **all** the income the Deceased earned in that period.

88. On the other hand, it is the clear evidence from Tang, as I mentioned in paragraph 32 above, that in between the stages of the formwork work undertaken by the Duo in the construction projects of D1, the Duo often went to other construction sites to work. I accept his such evidence and moreover would regard his such evidence as reliable and weighty because he would often need to liaise with the Duo to arrange for their return to his sites to continue with the next stage of formwork work. Moreover, the plaintiff gave evidence, which was unchallenged and I accept, that previously the Deceased had worked as a causal formwork worker at other construction sites<sup>26</sup>.

89. In the premises, I have no hesitation in not accepting Ds' said calculation of the Deceased's average monthly income.

90. Ds also submitted that the decisions in the cases of 香港特別行政區 訴 李欽培及另十一人<sup>27</sup> and *Kwok Cheuk Kin v Director of Lands*<sup>28</sup> have led to a reduction in the construction of small village houses and asked that a reduction of 30% in the Deceased's income be factored in.

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<sup>26</sup> Paragraph 3 of the plaintiff's supplemental witness statement at p109 of the Trial Bundles

<sup>27</sup> DCCC 25/2015

<sup>28</sup> [2020] 1 HKLRD 988. The first instance judgment was reversed by the Court of Appeal [2021] 1 HKLRD 737 in its judgment handed down on 13 January 2021

91. The judgments of the said 2 cases were handed down respectively on 27 November 2015 and 8 April 2019. As the first instance judgment in *Kwok Cheuk Kin v Director of Lands* was handed down on 8 April 2019, I do not think it could have any impact as we are concern here with the income of the Deceased up to the time he would have retired on 1 May 2019. While the former case decided that certain practices by certain developers in relation to the building projects of small village houses was criminal, it would not affect the construction of small village houses at large in all other instances not involving such practices. There is simply no evidence before me, whether by way of statistics or otherwise, to show that 李欽培's case did generally, adversely and significantly impact the total number of village type houses constructed, and also so impacted such as to result in a 30% general reduction, as now alleged. I therefore would not accede to Ds' said submission.

92. In support of the case of the average monthly earning being HK\$35,000, Mr Lim relied heavily on Tang's own evidence that the entire formwork work at the Site would have been finished within 2 months. Therefore, the Deceased's income in those 2 months would have been HK\$42,500 a month (HK\$85,000 x 2 houses x  $\frac{1}{2}$  x  $\frac{1}{2}$  ). That figure, seems to me, represents the higher point of his monthly earning as there was no evidence to show that the Deceased would be able to obtain contracts for formwork work consistently and back-to-back for the coming years after the accident. Rather, it is fairly accepted by Mr Lim that there may be busy as well as slack periods.

93. The plaintiff's own evidence was that she could not quite give a clear figure as to how many days a month the Deceased worked on

average in 2014. She could only recall that the Deceased was not working much in December 2013 and that the Deceased worked 10 odd days in the month of February 2014. She was not able to mention any recent period during which the Deceased worked for more than 10 odd days a month. Her general evidence was that she had not quite keep track as to whether the Deceased was out for work or was just going out. Regarding how much money the Deceased brought home, she said in evidence that sometimes the Deceased would give her as household expenses a sum of HK\$20,000 or even HK\$30,000 in cash, but sometimes only several thousand, and sometimes he would not give any if he did not have work. Though I find the plaintiff a truthful and reliable witness and I accept her evidence generally, her evidence in this regard was not particularly specific or helpful in giving a reliable picture as to the amount of work undertaken by the Deceased. Her evidence thus was that the number of days the Deceased worked a month was rather erratic. The tenor of her evidence, though, was that on average the number of days the Deceased worked in a month in late 2013 and 2014 seemed to be on the low side.

94. The plaintiff also gave evidence in her witness statement<sup>29</sup> that according to government statistics, the average daily earning of a formwork worker in July 2014 was HK\$1,716.70 and in March 2017 was HK\$1,978.20. Those figures were not challenged. Together, they would yield an average daily earning of HK\$1,847 in the period between these 2 dates.

95. In the round, I come to the view that the better and fairer method to ascertain the average monthly earning of the Deceased is by first

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<sup>29</sup> Paragraph 17 at p95 of the Trial Bundles

coming to a view as to the average number of days he would have worked in a month, multiply that by the said average daily earning, and then adjust that with the fact that he might likely be working as a contractor a good portion of those days on which he would have earned more than the average formwork worker, but as such, he also would have to incur some minor expenses for equipment and nails. Considering all the evidence in the round, I would fix it at 12 days a month, that gives HK\$22,164 a month (HK\$1,847 x 12 days), and with those adjustments which I could only broadly assess, I would fix his average monthly earnings at HK\$28,000 a month.

*Loss of earnings between accident and death*

96. There is a contention by Ds, premised on the significant reduction of the number of small village houses constructed as a result of the said two decisions, that the Deceased would have retired when he attained the age of 62. Save the 2 decisions, there was no other matters advanced at trial in this regard. I have above rejected the contended reduction as not proved. There is no dispute that the Deceased was otherwise healthy. There is no evidence to show that he could or would not continue to work as a formwork worker until 65. I thus accept the plaintiff's case that the Deceased would have worked until he attained 65.

97. The period between the date of the accident and the date of the Deceased's passing was 2 years 7 months and 26 days. I would round that up, as suggested by Mr Lim, to 32 months. The pre-trial loss of earnings therefore is assessed at **HK\$896,000** (HK\$28,000 x 32).

*Dependency*

98. Ds disputes that an award should be made under this head. The contentions, as I understand them, are:-

- a. The Deceased would have retired by the age of 62;
- b. On the premise that the Deceased would only earn HK\$14,259.30 (or less) after the accident, the plaintiff would be earning more than the Deceased;
- c. The Deceased and the plaintiff's grown-up son and daughter regularly gave money to them as family expenses, "there is no evidence that there existed a **need** for the plaintiff to pool their income like in *Wei Cuidan v Ming Fung Engineering Corporation Limited & Others*, HCPI 972/2014"<sup>30</sup> (my emphasis); and
- d. "The plaintiff has had sufficient financial resources without any dependency on the earnings of the Deceased."<sup>31</sup>

99. I have above rejected the contentions that the Deceased would retire at age 62 and that the Deceased earned and would have only earned HK\$14,259.30 a month.

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<sup>30</sup> Paragraph 48 of Ds' Closing Submissions

<sup>31</sup> Paragraph 49 of Ds' Closing Submissions

100. The latter 2 contentions above concern whether the plaintiff indeed has proven that she has a financial need. In my view, they are premised on there being a requirement that the plaintiff would need to prove a certain threshold of financial need before she is entitled to claim dependency. Ds have not cited any authority in support. With respect, I think Ds have misunderstood the nature of the claim of dependency. The loss of dependency is a loss recoverable from the tortfeasor responsible for the death. It is described thus by the learned authors of *McGregor on Damages*:-

‘the loss of the pecuniary benefit arising from the relationship which would be derived from the continuance of the life and which may consist of money, property or services : in other words, the value of dependency. The dependent is entitled, by clear principle of law, to full compensation for the loss of the pecuniary benefit ...

The basic rule, originally laid down in *Franklin v S.E. Ry* and ever since accepted and acted upon, is that the damages are to be calculated “in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life”...’ (§41-028 and 41-029 *McGregor on Damages* 21<sup>st</sup> ed.)

Thus, the entitlement to this loss of pecuniary benefit reasonably expected from the continuance of life of the Deceased is not dependent upon the plaintiff proving that she is in financial need. Therefore, the fact that their grown-up children regularly gave money to them and the fact that the plaintiff may have her own savings are not relevant, and would not preclude the plaintiff from recovering her loss of dependency.

101. I note rather, that there is unchallenged evidence given by the plaintiff that she and the Deceased as a matter of fact did pool their income together to pay for utilities and other expenses of the family<sup>32</sup>. I so find.

102. Ds did not dispute the approach of calculating the value of the dependency, where there are no dependent children, as explained and adopted by Bharwaney J in *Wei Cuidan*<sup>33</sup>, namely, the value of the loss monthly is 2/3 of the pooled monthly income less the survivor's own monthly income.

103. I accept that the plaintiff had been working as a Health Care Assistant in the employ of the Hospital Authority earning HK\$20,366 a month in 2017 and HK\$21,079 a month in 2018 until her retirement on 1 October 2018. After her retirement, the plaintiff would have become fully dependent on the Deceased until the Deceased's notional retirement at 65 on 1 May 2019.

104. For the notional income of the Deceased, the plaintiff claims, and I accept, that there should have been an annual increment of 5% from 2018 on (the increment for 2017 having already been factored in, see paragraph 94 above).

105. The dependency in 2017 and 2018 before the plaintiff retired totalled to HK\$225,998, calculated as follows:-

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<sup>32</sup> Paragraphs 20 and 21 of her witness statement at p96 of the Trial Bundles

<sup>33</sup> HCPI 972/2014, unrep, 3 November 2017

a. March to December 2017:  $[(HK\$28,000 + HK\$20,366) \times \frac{2}{3}] - HK\$20,366 = HK\$11,878$  a month  $\times 9.5$  months = HK\$112,841; and

b. January to September 2018:  $[(HK\$28,000 \times 1.05 + HK\$21,079) \times \frac{2}{3}] - HK\$21,079 = HK\$12,573$  a month  $\times 9$  months = HK\$113,157.

106. For the period after the plaintiff's retirement until the Deceased would have retired on 1 May 2019, it is also not disputed that the loss of dependency is calculated according to the conventional approach in *Harris v Empress Motors*<sup>34</sup>, namely,  $\frac{2}{3}$  of the notional income of the Deceased. The dependency totalled to HK\$141,120, calculated as follows:-

a. October to December 2018:  $HK\$28,000 \times 1.05 \times \frac{2}{3} \times 3$  months = HK\$58,800; and

b. January to April 2019:  $HK\$28,000 \times 1.05 \times 1.05 \times \frac{2}{3} \times 4$  months = HK\$82,320.

107. The award for dependency is thus **HK\$367,118** (HK\$225,998 + HK\$141,120).

*Loss of accumulation of wealth*

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<sup>34</sup> [1984] 1 WLR 212



108. The plaintiff asks that a global sum of HK\$150,000 be awarded under this head.

109. In assessing whether an award should be made, the court has to consider whether at the date of death by natural causes, there would have been an accumulation of wealth, the realization of which the tortious death has prevented. In that regard, the court would need to examine the realistic possibilities that the wealth accumulated at retirement (plus the pension or other income to be received in the retirement, if any) would need to be used to meet the expenditure during retirement such that the wealth accumulated might be exhausted before the notional time of death by natural causes (*Lam Pak Chiu v Tsang Mei Ying*<sup>35</sup> and *Fung Suen Sim v Liu Chun Pong & Another*<sup>36</sup>).

110. From the bank passbooks and bank statements produced, it is shown

- a. The balance in the Deceased's Bank of China savings account was HK\$19,646.84 on 12 July 2014;
- b. The balance in the Deceased's HSBC savings account was HK\$100,860.63 on 12 July 2014, and a great number of deposits were in the sum of HK\$7,800 a month which were monthly deposits made by their daughter;

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<sup>35</sup> (2001) 4 HKCFAR 34

<sup>36</sup> HCPI 896/2007, unrep, 23 December 2011, Bharwaney J

c. The balance in the Deceased's Bank of China multi-currency account was RMB 5,501.65 on 30 June 2014;

d. The balance in the joint account of the Deceased and the plaintiff in Chong Hing Bank was HK\$2,154.61 on 30 June 2014;

e. The plaintiff's investment account with HSBC showed there were shares having a total portfolio value at HK\$169,177.07 on 31 October 2013. According to the plaintiff, this represented the joint savings of hers and the Deceased's.

111. These bank passbooks and statements do not show a pattern of saving on the part of the Deceased, nor do they show that the Deceased was able in his working life, up to the time of the accident, to accumulate much wealth.

112. It seems to me very clear that in all likelihood whatever he would have been able to accumulate at his retirement, had it not been the accident, would have been exhausted during his retirement to meet his expenditure. It is quite clear that there would not have been an accumulation of wealth between the time of tortious death and the notional time of death by natural causes.

113. I therefore would not be able to make an award under this head.

*Loss of services*

114. The plaintiff's evidence was that the Deceased regularly performed minor maintenance at home, such as electrical, plumbing and other odd jobs, and repainted the flat every 4 years or so. They lived in their own flat in Beverly Garden in Tseung Kwan O which was built in 1998, and by now would be in need of regular minor maintenances, if not more major ones. The Deceased was 60 at the time of the accident and healthy, and I find, would have continued to provide these services for a good number of years. I would award as reasonable a sum of **HK\$80,000**.

*Costs of care - hiring a 2<sup>nd</sup> domestic helper and travelling expenses*

115. The Deceased remained unconscious after the accident and was in a vegetative state until he passed away. He was hospitalized in Tuen Mun Hospital and since mid October 2014 in Haven of Hope Hospital.

116. As said, the plaintiff had been working full time as a Health Care Assistant until October 2018. She was therefore in no position to go to the hospital each day to take care of the Deceased.

117. The plaintiff signed a contract on 28 September 2014<sup>37</sup> to engage a Filipino maid to provide care to the Deceased by going to the hospital each day to massage the Deceased, change his lying positions, wash him and change his diapers and such. From the record of payment of her salaries<sup>38</sup>, it can be seen that the Filipino maid arrived in Hong Kong

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<sup>37</sup> P.355 to 358 of the Trial Bundles

<sup>38</sup> P.359 to 360 of the Trial Bundles

and began her work in December 2014. Later on, the plaintiff engaged another Filipino maid to continue to provide such care to the Deceased. When the Deceased passed away on 14 March 2017 and the maid's services were therefore no longer required, the plaintiff immediately dismissed her the next day<sup>39</sup>.

118. Ds did not dispute (a) that care need to be provided to the Deceased, (b) the plaintiff was not able to provide such care herself, (c) the plaintiff did engage and pay for the Filipino maid to provide such services and care, and (d) that the Filipino maid was immediately dismissed the next day after the Deceased passed away.

119. Ds' contention was that such care could and should have been provided by the other Filipino maid who the plaintiff and the Deceased at the time had already engaged<sup>40</sup>.

120. I reject that contention. Firstly, it can be seen from the contract of the original maid<sup>41</sup> that she was engaged to take care of 2 adults (the Deceased and the plaintiff) and 2 minors aged below 5. Therefore, she would already have her day of work cut out for her. Secondly, such visits to the hospital including travelling and preparation would have taken about 3 hours and would be quite exhausting, such that it seems to me very unreasonable and impractical to impose such significant additional task daily upon the original maid for a prolonged period of time (about 2 and a half years), particularly bearing in mind that usual visiting hours for

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<sup>39</sup> See letter of termination dated 15 March 2017 at p366 of the Trial Bundles

<sup>40</sup> See her contract dated 27 March 2014 at p343 to 346 of the Trial Bundles

<sup>41</sup> P345 of the Trial Bundles

hospital were in the late afternoon when the original maid would need to prepare dinner (and probably need to perform other tasks as well).

121. Moreover, it seems to me very clear that the costs of employing part-time help from residents of Hong Kong to perform such a task daily would have been much more expensive than employing a foreign domestic helper. To illustrate, the alternative would be paying for part-time nursing help for a total of 60 hours per month (3 hours x 5 days a week x 4 weeks). The monthly cost of such part time help would have been cheaper than the monthly salary of the Filipino maid at HK\$4,100 a month if the hourly rate was HK\$68 an hour ( $\text{HK\$}4,100/60$ ) or lower. I do not think the plaintiff would have been able to secure such services and care from a local resident at such a low hourly rate as HK\$68.

122. In all, I find the costs of care as claimed reasonable and would allow it. The contracts show that the Filipino maid was engaged from December 2014 to March 2017. The monthly salary of HK\$4,100 was agreed to by the parties. Thus, I would award  $\text{HK\$}4,100 \times 28 \text{ months} = \text{HK\$}114,800$ .

123. The plaintiff also claims a modest amount of HK\$600 a month as travelling expenses for the maid and the plaintiff to and from the hospital for visiting the Deceased. I allow it and award it for the entire period when the Deceased was hospitalized:  $\text{HK\$}600 \times 32 \text{ months} = \text{HK\$}19,200$ .

124. The award under this head is therefore **HK\$134,000**.

*Summary of awards*

125. In summary, I award

PSLA	HK\$500,000
Bereavement	HK\$231,000
Funeral and other agreed expenses	HK\$63,562.30
Loss of earnings	HK\$896,000
Dependency	HK\$367,118
Loss of accumulation of wealth	HK\$0
Loss of service	HK\$80,000
Costs of care	HK\$134,000
Total:	HK\$2,271,680.30
90%, rounded up to	<b>HK\$2,044,513</b>

*Disposal*

126. In the premises, I find the defendants 90% liable and enter judgment in favour of the plaintiff against the defendants in the sum of HK\$2,044,513.

127. I award to the plaintiff the interest as claimed:-

- a. at 2% per annum on damages for PSLA from the date of service of the Writ to the date of this judgment;

b. at judgment rate on damages for bereavement and the funeral expense of HK\$51,688 from the date of death to the date of this judgment;

c. at half judgment rate on the loss of dependency and special damages (except the said funeral expenses) from the date of death to the date of this judgment; and

d. at half judgment rate for loss of earnings from the date of accident to the date of this judgment.

128. I make a costs order nisi that the defendants do pay to the plaintiff her costs of this action (including all costs reserved, if any) taxed at the High Court scale before this action was transferred to the District Court and thereafter at the District Court scale, with certificate for counsel, to be taxed if not agreed. The plaintiff's own costs will be taxed according to the Legal Aid Regulations. This costs order nisi will become absolute within 14 days unless any party applies by summons to vary within that time.

129. Lastly, I thank both counsel for their helpful assistance.

( KC Chan )  
District Judge

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Mr Patrick D Lim and Mr Conan Shek, instructed by Liu, Chan & Lam,  
assigned by the Director of Legal Aid, for the plaintiff

Mr Tony Ko, instructed by W H Chik & Co, for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

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