

DCPI 17/2013

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO 17 OF 2013**

BETWEEN

RAJWINDER SINGH Plaintiff

and

MAN HUNG KWAN (文洪坤) 1st Defendant

LO WAI MAN trading as 2nd Defendant
WAI LUN FURNITURE & DECORATION
(Dismissed by the Order dated 29th April 2013)

Before: His Honour Judge Andrew Li in Court

Date of Hearing: 13 to 16 October 2015

Date of handing down Judgment: 28 January 2016

JUDGMENT

INTRODUCTION

1. This is a personal injury claim brought by the plaintiff against the defendants.

2. The plaintiff's claim against the 2nd defendant was dismissed by a court order dated 29 April 2013.

3. Hence, at the trial of this action before me, the only remaining case of the plaintiff was against the 1st defendant, who was his employer at the time of the accident.

BACKGROUND

4. The plaintiff alleges that on 22 July 2011, while he was working at a site under renovation situated at Unit 2C, Pak Villa, 41 Shouson Hill Road, Hong Kong ("the Site"), while lifting a bag of cement with the assistance of the 1st defendant's wife Madam Hung Wing-hung (「孔永紅」) ("Madam Hung"), he injured his back ("the Accident").

5. The plaintiff claims that the Accident happened while he was trying to lift a bag of cement weighing 45kg. He claims that he was in a "leaning and kneeling down" position, while Madam Hung was assisting him by putting the bag on his shoulder. The plaintiff further claims that while he was about to stand up, with the bag of cement still partially on his shoulder, Madam Hung suddenly withdrew her hands. The plaintiff also claims that he felt severe pain in his back and heard a cracking sound from his back immediately. He then lost his balance and fell with his right knee landing on the ground.

DISCUSSION

LIABILITY

Evidence not in dispute

6. It is not disputed by the 1st defendant that the plaintiff was working for him at the Site on the date of the Accident. It is also not disputed by the 1st defendant that the plaintiff claims he had allegedly suffered from some sort of injury while transporting the bag of cement at the Site. However, the 1st defendant claims that the plaintiff had “faked” the Accident by deliberately throwing the bag of cement on the floor after it was being successfully placed on his shoulder by his wife.

Evidence in dispute

7. The following are the areas in dispute between the parties regarding the Accident. They are:-

(i) Whether the plaintiff was introduced to work at the Site by a fellow countryman by the name of Boota Singh or “Jacky”?

(ii) How did the Accident happen?

(iii) What took place immediately after the Accident?

(iv) Whether the 1st defendant offered to pay compensation to the plaintiff in a subsequent meeting in Mongkok?

8. I shall deal with the above issues individually and make my findings accordingly below.

(i) *Whether the plaintiff was introduced to work by Jacky?*

9. On this issue, as on all material issues in this case, I find the plaintiff to be an unreliable, evasive and dishonest witness. I find his evidence to be inconsistent with the contemporaneous documents, previous statement made by him and other circumstantial evidence. I have no hesitation in rejecting his version of events insofar as it goes to the core of this case.

10. In relation to how the plaintiff had come to work at the Site on the date of the Accident, the plaintiff has persistently denied that he was introduced to work there by a fellow countryman named Boota Singh, or known to others as “Jacky”. I find it totally unconvincing when the plaintiff denied that he even knew who Jacky or Boota Singh was when all 3 defence witnesses have testified not only to the existence of such person but also explained the important role he played in the plaintiff’s employment with the 1st defendant. In my judgment, it is crucial that a “go-between” like Jacky would act as translator for the parties when the plaintiff himself admitted that he could not speak Cantonese and could only manage some simple English only. On the other hand, the 1st defendant and his wife could only speak Cantonese and do not speak any English at all. In my view, without someone to act as a “go-between” like

Jacky, there is no way that the plaintiff would be able to communicate with the 1st defendant and to make arrangements with the 1st defendant for practical matters like, where to turn up for work, what jobs to do while working and the terms of the employment like working hours, wages, etc. Thus, I do not believe the plaintiff did not know a person called Jacky.

11. I also reject the plaintiff's claim that the 1st defendant had obtained his phone number (and therefore able to contact him directly) because he had previously worked for the 1st defendant in a different project in Wanchai. I do not accept that was the case. As even if the 1st defendant had his phone number, the 1st defendant still would not be able to communicate with him due to the language barrier. The plaintiff's later attempt to explain that he could communicate a little bit in Chinese is simply not believable because he could not even tell the court exactly what he heard from the plaintiff regarding the exact location where they were supposed to meet that morning. His further attempt to explain that it was his brother-in-law who had taken him to meet the plaintiff simply does not sit well with the defence's evidence that he was able to find his way to meet the 1st defendant at Causeway Bay MTR Station because he was with Jacky together.

12. Further, the plaintiff's explanation of the alleged involvement of his brother-in-law in arranging the job had simply never been mentioned in his witness statement. I do not accept that it happened in the way as the plaintiff has described it in court.

13. All the above has led me to come to the conclusion that the plaintiff was less than truthful when he told the court that he was not introduced by Jacky to work for the 1st defendant.

(ii) How the Accident occurred?

14. The plaintiff described the Accident in his witness statement, which was prepared by the solicitors previously assigned by the Director of Legal Aid who was then representing him, in the following manner:-

“On 22nd July 2011 at about 9:15 a.m. while in the course of employment with the 1st Defendant, I was instructed to lift up a bag of cement weighing about 45 kg. At that time, I was leaning and kneeling down. My boss’s wife then assisted me to put a bag of cement on my shoulder. While I was about to stand up with the heavy bag of cement on my shoulder, she suddenly withdrew her hand. As the bag of cement was not put on my shoulder properly, I heard a cracking sound from my back while I was standing up with the bag of cement. I lost balance and fell down with the heavy bag of cement. As a result of the accident, I sustained personal injuries.”

15. The plaintiff’s above account was supported by his countryman and fellow worker Baldev-Singh’s statement. This Mr Singh had made a witness statement which was filed on the plaintiff’s behalf in the present proceedings. However, the plaintiff has failed to call him as a witness at the trial without providing any good reasons. As such, I am entitled to draw an adverse inference against the plaintiff in his failure to call a material witness: see *Ng Choi Sang v Chu Yu Tin* [2009] 4 HKLRD 747 per Recorder Kwok SC at pp 757 – 758.

16. However, when the plaintiff gave his evidence in court, he tried to embellish his case by adding, *inter alia*, the following:-

- (a) Madam Hung who was holding the two corners of the bag of cement had suddenly let go while he was still in a half-squatting position which caused him to fall;
- (b) Madam Hung helped him to lift the bag but she did not wait until it was securely placed on his shoulders before she let go;
- (c) He felt pain at his back immediately after the bag was placed on his shoulders and fell on the spot; and
- (d) He allegedly did not shout at all but told Madam Hung that he had pain.

17. What the plaintiff could not explain is why in the medical report he has told the doctor that he had “landed on his right knee”. He also could not explain why this crucial matter has never been mentioned in his statement of claim or witness statement. His explanation that he had told his lawyer about this but it might have been omitted by his assigned solicitors, in my view, was simply not believable. He then tried to explain that there was a possibility that this might have simply skipped his mind at the time when he gave instructions to his assigned solicitors is again hard to believe. He further tried to claim that he had only talked to his assigned solicitors once when he gave his statement to him and therefore he might have forgotten to mention it on that occasion. Again, this beggars belief.

18. On the other hand, I find the 1st defendant’s wife Madam Hung as a more reliable and creditable witness. I accept her evidence

when she told the court that the plaintiff and the co-worker were required to transport two bags of cement from the ground floor to Unit 2C on the second level of the building. She first saw those two workers helping each other in placing the bags of cement on each other's shoulder to transport them upstairs. When Madam Hung arrived the ground floor level, the plaintiff saw her and asked her to place a bag of cement on his shoulder. While the plaintiff was in a half squatting and half standing position, he lifted one corner of the bag while Madam Hung lifted the other. By this way, the plaintiff managed to place the bag of cement squarely on his shoulder and started to walk away. Madam Hung then released her hand. After walking for 4 to 5 steps, the plaintiff suddenly threw the bag of cement on the floor and at the same time shouting loudly at Madam Hung that she was "playing game" with him. He scolded Madam Hung for allegedly using the bag of cement "to throw at him and thus making his back becoming very painful" (「阿姐，你玩野啊！拿包英泥來掙我，而家條腰好痛。」).

19. Having heard both the plaintiff and Madam Hung giving evidence in court in respect of how the Accident has allegedly happened in this case, I have scant doubt that the plaintiff was not telling the truth. The plaintiff, being a very strong built individual, would, in my view, have had no difficulty in lifting the bag of cement and carried it by himself on his shoulder. If he was being assisted by another person in the task, that person only needed to place it lightly on his shoulder while he was in a semi-squatting position. The fact that the plaintiff had no problem in transporting the bags of cement for a few rounds prior to the Accident indicates that it was not a difficult task for him to perform at all. Further, given the plaintiff's rather odd conduct immediately after the Accident, I

do not believe that the Accident happened in the way as he described by him at all. In my judgment, the Accident was staged by him as a deliberate attempt to extort money from the 1st defendant. This becomes more apparent when one looks at the rather odd behaviour of the plaintiff and his co-worker immediately after the Accident.

(iii) What happened immediately after the Accident

20. The following events which were admitted by the plaintiff in evidence occurred immediately after the Accident. They have led me to come to the conclusion that not only the Accident did not occur in the way as described by the plaintiff. In my judgment, it was deliberately staged by him with a view to extort money or claim compensation from the 1st defendant.

21. The plaintiff admitted that after the alleged Accident, instead of calling for an ambulance to be admitted to a hospital or going to a registered medical practitioner for consultation, he went to an unregistered bonesetter in Tokwawan near to where he lives instead. Not only the bonesetter was not a registered medical petitioner, he was a person known to the plaintiff and his family for years. What was more unusual is that after the consultation with the bonesetter, instead of resting at home, the plaintiff went back to the Site by taxi to see the 1st defendant. Further, instead of simply submitting the sick leave to the 1st defendant, he demanded more money from the 1st defendant. This was on top of the \$2,100 the 1st defendant had already given to the plaintiff earlier before he left for the bonesetter consultation. The plaintiff apparently was not satisfied with that small amount of money from the 1st defendant, he went

back to the Site to demand for more. On this occasion, he suggested a figure of \$7,000. When the 1st defendant refused to pay him, the plaintiff suddenly pretended to have suffered sharp pain on his left leg, fell and lied on the ground with his 4 limbs outstretched. His friend and co-worker, who had accompanied him to go back to the Site, then took photograph of him with his mobile phone while the plaintiff was lying on the floor outside of Unit 2C.

22. I reject the plaintiff's evidence that he went back to the Site in the afternoon with a view to work again as alleged by him. I also reject his claim that he had not demanded any money from the 1st defendant. In my judgment, it is quite clear that the only purpose of the plaintiff and his fellow countryman co-worker in returning to the Site to see the 1st defendant that afternoon was to try to get more money out of him. When he failed to get any, the plaintiff then pretended to have "fallen down due to pain". It was then that his friend had tried to take picture of him while he was lying down on the floor outside of Unit 2C. His explanation that he had suddenly felt sharp pain on his left side with has caused him to fall down is my view totally unbelievable. In my view, it was an act put up by him with the sole aim to extort money from the 1st defendant.

23. When it was clear that the 1st defendant would not yield to his demand, the plaintiff and his friend then left for the government hospital to consult a doctor for the so-called injury sustained by him earlier.

24. For the above reasons, I do not consider that the plaintiff had sustained any genuine injury in the Accident at all. I find that not only the plaintiff had caused the Accident in the way as described by Madam Hung

in her evidence, he had also returned to the Site in the afternoon with a view to demand more money from the 1st defendant. When the 1st defendant refused to pay him, the plaintiff then pretended to fall on the ground again, allegedly due to the sudden pain in the left leg. All the above in my judgment only points to the fact that the plaintiff was an extremely dishonest and scheming person who had not suffered any real injury at all on the date of the Accident.

(iv) Whether the 1st defendant offered to pay any compensation in a meeting in Mongkok

25. Although strictly speaking this is a peripheral issue which would not affect the outcome of this case, I find the plaintiff's story on whether a meeting took place in Mongkok when he demanded compensation in the sum of \$30,000 simply not believable. I find that the meeting happened in the way as described by the 1st defendant rather than the plaintiff. Further, I find that the 1st defendant was truthful when he said that the plaintiff was accompanied by Jacky on this occasion which is something that the plaintiff has again denied. I also find the plaintiff had initially demanded \$10,000 from the 1st defendant and when the 1st defendant agreed to that but did not have sufficient cash on him at the time, the plaintiff then threatened him that he would cause trouble to him that very evening. I also find as a fact that there was a second meeting 3 days later when the 1st defendant agreed to pay the plaintiff \$10,000 and agreed to meet up in Mongkok. I find the 1st defendant only agreed to pay him because he did not want to have further troubles from him rather than believing that the plaintiff had suffered any genuine injury in the Accident.

Conclusion on liability

26. Giving the findings I made above, I do not consider there was any liability on the part of the 1st defendant in this case, whether it was based on a case of negligence, breach of employer's implied duties or breach of statutory duty as alleged by the plaintiff in the statement of claim or at all. In the circumstances, I find the plaintiff has failed to establish his case on a balance of probability against the 1st defendant and his case must be dismissed accordingly.

QUANTUM

27. For the sake of completeness, I shall provide my brief views on the quantum in this case, on the basis that if liability was found in favour of the plaintiff.

28. On the alleged injury, it is my view that plaintiff has grossly exaggerated the injury allegedly sustained by him in the Accident. This can be clearly seen from the joint medical report filed by the parties. In the report, both medical experts did not consider the plaintiff's injuries were serious at all. Dr Lam Kwong Chin, who was appointed by the 1st defendant then solicitors while he still had legal representation, opined that the plaintiff's "back sprain" was actually due to his persisting back problems, with caused the onset of pain at that stage. The medical experts agreed that the plaintiff had "a mechanical low back pain, mainly with tenderness over the left paraspinal muscle". The pain was mainly with soft tissue/paraspinal sprain muscle involvement. There was no well-defined neurological deficit.

29. When the plaintiff was examined by the two experts in August 2012, there was no loss of lumbar lordosis and no paraspinal muscle spasm. Dr Lam is of the opinion that the preservation of lumbar lordosis and absence of paraspinal muscle spasm are objective signs showing the pain should be of a minor degree. I agree with Dr. Lam's finding on this. I also agree with Dr Lam that there are signs of exaggeration or functional overlay when tested were being carried out by the experts. I reject Dr Wong Chin Hong's over simplistic approach which led him to conclude that despite the "over-expectation of symptoms and signs" at the time of joint examination, he believed that the plaintiff have "genuine back pain and tenderness as recorded at various stages by different medical officers." In my view, the overall picture painted by the treating doctors and the experts is clear: the plaintiff had not suffered any serious injury in the alleged Accident. He should be able to return to his previous job as opined by Dr Lam, even with strenuous duties. In my view, all the objective signs go to support that. I agree with Dr Lam that the overall effect of the alleged injury to his working ability should be mild if not negligible. I also agree with Dr Lam that the plaintiff has not suffered any substantial disadvantage in the labour market or any higher chance of losing his job due to the injury. I further reject Dr Wong's over simplistic view that the plaintiff needs to modify his work routine if he returns to work at a construction site as general labourer. I also reject Dr. Wong's view that the plaintiff is only suited for lighter job like watchman or shop assistant. Lastly, I do not consider that the objective signs of the injury support Dr Wong's opinions.

30. The assessment by the experts of loss of any capacity respectively at 1% and 3% go to show that his injury, no matter how one look at it, is fairly minor and would not affect his earning capacity in any substantial or real way. I also prefer Dr Lam's assessment on the plaintiff's sick leave period of up to 3 months only and not as assessed by Dr Wong of that a prolonged period of sick leave as certified by the government doctors.

31. Based on the above evidence, had I found liability in favour of plaintiff, my assessment of quantum under the different heads of claims are those as set out in the following paragraphs.

PSLA

32. Based on the opinion of Dr Lam, of whose opinion I prefer, I would assess the PSLA award in this case at \$100,000.

Loss of past earnings

33. Again, based on the opinion of Dr Lam, I consider that a reasonable sick leave for the plaintiff minor injury alleged sustained by the plaintiff would be 3 months and therefore the loss of past earnings will be at:

$$\$16,900 \times 3 \text{ months} \times 1.05 = \$53,235.$$

Loss of future earnings

34. In my judgment, based on the clear objective medical evidence, there will be no future loss of earnings in this case.

Loss of earning capacity

35. Whether based on Dr Lam or Dr Wong's opinion, I do not consider this is a case where a separate award for loss of earning capacity is appropriate.

Other special damages

36. Had I found liability against the 1st defendant in this case, I would allow medical expenses at \$6,130 as claimed, travelling expenses at \$2,000 and tonic food at \$2,000, making the total expenses allowed at \$10,130.

Employees' compensation received

37. I was given to understand that an award of \$143,985 was paid by the 1st defendant by way of employees' compensation to the plaintiff in this case. I was told by the 1st defendant and his wife had paid this money to the plaintiff personally and the same did not come out from any insurance policy. For whatever reasons such payments were made to the plaintiff, credit has to be given for this amount in any award had liability been found in favour of the plaintiff in this case.

Summary of calculations

38. In summary, had I found liability in favour of the plaintiff in this case, I would have awarded the following amount of damages to him in view of the matter with evidence:-

PSLA	\$100,000
Pre-trial loss of earnings and MPF	\$53,235
Loss of earning capacity	Nil
Future loss of earning	Nil
Other special damages	<u>\$10,130</u>
Sub-total:	\$163,365
Less: ECC	<u>\$143,985</u>
Total:	\$19,380

39. There will be the usual interest to be awarded on the above sum: (i) at 2% for general damages from the date of issue of writ to date of judgment; and (ii) at half of the judgment rate for any special damages from date of the Accident to date of judgment; thereafter at judgment rate.

CONCLUSION

40. To conclude, based on the aforesaid findings made by me on liability, the plaintiff's case is hereby dismissed with costs to the 1st defendant, such costs to be paid by the plaintiff on an indemnity basis. Both the plaintiff's own costs and the 1st defendant's own costs, insofar as during the time when they were represented by solicitors assigned by the

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Director of Legal Aid is concerned, would be subject to the legal aid
taxation.

(Andrew SY Li)
District Judge

The plaintiff was not represented and appeared in person
The 1st defendant was not represented and appeared in peson

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