

**IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
PERSONAL INJURIES ACTION NO 23 OF 2012**

BETWEEN

TSANG CHI CHEONG

Plaintiff

and

THE INCORPORATED OWNERS OF  
MEI KING MANSION (STAGE 1)

Defendant

Before: His Honour Judge Andrew Li in Court

Date of Hearing: 8, 10 to 11 September 2014 & 16 October 2014

Date of Judgment: 31 March 2015

**JUDGMENT**

1. This is a personal injury case involving an electrician who was electrocuted while working at the defendant's premises.

*INTRODUCTION*

2. On 12 January 2009, the plaintiff, a registered electrician, was asked by the defendant to carry out emergency repair work at a building known as Mei King Mansion (Stage1) situated in To Kwa Wan, Kowloon (“the Building”).

3. While repairing a fuse box inside the Building, the plaintiff sustained an electrical shock and burns when someone suddenly turned on the electrical supply at the main switch (“the Accident”).

4. I am asked to decide on both the issues of liability and quantum in the case.

*BACKGROUND*

5. The plaintiff was and is an electrician registered under the Electricity Ordinance, Cap 406 (“the EO”) and traded under the name of Chiu Man Water, Electrical & Air-conditioning Engineering.

6. The defendant was and is the incorporated owners of the Building and the occupier of the common parts of the Building.

7. In the afternoon of 12 January 2009, the plaintiff was contacted by the defendant to carry out emergency work to a fuse box situated on the 5<sup>th</sup> Floor (“5/F”) of the Building. Having turned off the electricity supply at the main switch situated on the Ground Floor (“G/F”) and allegedly hung a warning sign over it, the plaintiff returned to the 5/F

to replace the new fuse. While he was doing so, the electricity supply was suddenly re-connected by someone without notice, causing electrical shock and burns to his neck as a result.

8. There is a marked difference between the parties on the evidence of how the plaintiff was contacted, who gave the plaintiff his instructions, whether someone had issued the warning notice, hung the warning sign over the main switch, etc. Some of these matters are relevant to the issue on liability and some are not. I shall try to resolve them in the later part of this judgment.

9. On the issue of quantum, the injuries of the plaintiff cannot be described as serious. It is apparent that he has recovered well from the Accident. It is mainly on the claims for PSLA, loss of past earnings and future earnings/loss of earning capacity that I have to decide upon.

### *DISCUSSION*

#### *The plaintiff's case*

10. The plaintiff states in his evidence that he was first contacted by the defendant at around 4:30 pm on the day of the Accident regarding the repair work. He arrived the Building at around 5:00 pm with his son, Tsang Fai-man, who was working for him. He allegedly met with the security supervisor of the Building ("the Supervisor") and 2 committee members of the defendant. He told them that the defendant need to turn off the electricity supply and issue a warning notice to the residents before he could carry out the work. The Supervisor agreed to issue such

a written notice. The plaintiff then went out to purchase materials for the repair work and returned to the Building some 15 minutes later in order to carry out the repair.

11. Upon his return, he was taken to the G/F of the Building near the back staircase at which the main electrical supply switches were located. One of them governed the electricity supply from 1/F to 5/F. The plaintiff turned off the main switch and allegedly hung the plastic warning sign which he had brought with him to the Building over the main switch before going up to 5/F to attend to the fuse box.

12. He was also told by the Supervisor that the defendant had already issued the notice to other residents regarding the repairs and the plaintiff could go ahead with the work.

13. The plaintiff states that it was only upon arriving the Building that he has made the request for the defendant to issue the notice and to turn off the electricity supply. He says that he personally has read the notice and it reads something like: “Termination of Electricity Supply” (「停電通告」) “Repairing fuse box at 5/F of the Building” (「維修大廈 6 樓保險絲盒」). He claims that it was posted at the notice board at the lobby of the Building on a A4 size paper, written by someone from the defendant.

14. Before the plaintiff started his repair work, he had examined and made sure that the electricity to the fuse box on 5/F had in fact been disconnected. However, while the plaintiff was installing the new fuse in

the fuse holder, someone suddenly re-connected the electricity again. As a result, he suffered electrical shock and burns.

15. What is worth noting here is that the plaintiff did not immediately go to the hospital after the Accident. Instead, he went down to the G/F and allegedly found the plastic warning sign was still hanging over the main switch. This time, he asked his son to stay on the G/F to keep watch over the main switch. He then went back to the 5/F to complete the unfinished work.

16. Police allegedly attended the scene of the Accident soon after. The plaintiff says that he did not call the police but some residents of the Building did. He mentions that when the police arrived at the scene he was asked whether he needed an ambulance. As the work had not yet been completed, he told the police that he would go to the hospital to seek treatment by himself later. At about 7:10 pm that evening, the plaintiff went to the Hung Hom Police Station to formally report the matter. He later went to the hospital for treatment by himself. The medical report from Queen Elizabeth Hospital (“QEH”) recorded that the plaintiff attended its Accident and Emergency Department (“A&E”) at 20:46 on that day.

*The defendant’s case*

17. Mr Lam Sai Yue (“Lam”), the chairman of the incorporated owners of the Building was the only witness who testified on behalf of the defendant. He was not present at the scene when the Accident happened. Neither Ting Ching Kei (「丁清棋」) (“Ting”), the caretaker

of the Building who was on duty at the time of the Accident nor any of the committee members was called to give evidence.

18. Lam alleges that nobody has discussed with him on 12 January 2009 about the issuing of any warning notice regarding disconnection of electrical power at the Building on that day. He has not seen such notice and nobody has informed him about the Accident. Further, he says that nobody has told him about the police attending the Building on that day nor did anybody tell him about someone had reported the matter to the police.

19. The defendant also relies on the minutes of the management committee meeting which took place at 8:00 pm on that day. Nothing was mentioned about the Accident in the minutes.

20. Further, the defendant claims that the plaintiff has never informed him, Ting or any committee members on the day of the Accident that the electricity supply of the Building had to be disconnected.

21. In short, the defendant claims that it did not know that an accident involving the plaintiff occurred in the Building on the day of the Accident.

22. Instead, Lam claims that the defendant only found out about the alleged Accident at the Small Claims Tribunal ("SMT") on 29 September 2010 when the plaintiff claimed for damages.

23. In any event, the defendant says that it has discharged any duty of care owed to the plaintiff in that it had reasonably engaged a competent independent contractor in electrical worker who held himself out as a registered electrical worker.

24. In a letter to the defendant's solicitors dated 17 October 2014, the divisional commander of the Hung Hom division of the Police stated the following:-

"According to our record, Mr. TSANG Chi-cheong made a report to police at about 1910 hours on 2009-01-12. He stated that he cut off the power and conducted maintenance on the electricity supply at Phase 1, Mei King Mansion, No. 2 Mei King Street, Hung Hom at about 1830 hours on 2009-01-12. The electricity supply was suddenly turned-on by someone and Mr. TSANG suffered minor injury on the neck in the incident.

Mr. TSANG stated that he would like to make a report at that stage for record purpose. Case was classified as 'Miscellaneous Incident' and closed."

*Finding of fact*

25. Given the fact that the plaintiff had reported the matter to the Police and attended the A&E of QEH on the day of the Accident, I have little doubt that an accident involving electrocution did happen to him on that day. In this respect, I prefer the plaintiff's evidence than that given by Lam. I reject Lam's evidence that no accident involving the plaintiff happened on that day at the Building. He was not present and simply would not know. The only person in the defendant who has personal knowledge, namely Ting was not called to give evidence. Thus, the only

question is whether the Accident happened in the way as described by the plaintiff.

26. Regrettably, I find the plaintiff's evidence rather unsatisfactory and not at all convincing. I do not think the plaintiff is telling the court the whole truth regarding the Accident itself. I find in some material parts of the case, he might be telling the truth while in others he definitely was not. In this regard, I have given extra allowance for the fact that he is not very well educated and could not articulate well in court.

27. First, regarding the issue of the warning notice by the defendant, I accept the plaintiff's version of events.

28. I believe that the plaintiff did ask the defendant to issue a warning notice to the occupants of the Building shortly after his arrival of the Building and before he started his repair work. He states in evidence that when he received the telephone call from the defendant, he did not mention to the defendant that it has to shut down the electricity supply or to issue a maintenance notice. This is perfectly plausible as he would not know at that time what he has to fix and whether disconnecting of the electricity supply would be necessary.

29. In my view, it is quite possible that in between the time after he arrived the Building and before he started working on the fuse box (which was more than 15 minutes according to his estimate), the defendant would be able to issue such a handwritten notice. I believe this is exactly what the plaintiff has told the Supervisor and the 2 committee



members and it was what they did on that day. In this respect, I reject Lam's evidence that only the chairman of the defendant was authorized to issue such a notice. Further, I reject Lam's evidence that the defendant would need at least 3 days notice if they wish to issue such a notice to the occupants of the Building. Given the fact that this was an emergency situation where the residents from 5/F of the Building had suddenly lost their electricity supply, it is in my view unrealistic to assume that the residents would have to wait for 3 days before the defendant would issue such a notice. The fact that Lam claims that he had not seen such a notice nor did he permit any of such notice to be issued on that day is in my view not here nor there. I think for safety reasons, the caretaker would have followed the request of the plaintiff to issue and display such notice.

30. I also believe the plaintiff that 2 committee members of the defendant were present when he first arrived the Building. Although this was contradicted by Lam's evidence when he says he had checked with all 13 committee members and none of them said they had met the plaintiff on the date of the Accident, I doubt such self-serving statement is true. The fact is that the defendant has failed to call the 2 caretakers who they say were on duty at the time of the Accident to give evidence at the trial. They would be witnesses who will able to tell the court whether the 2 committee members were present when the plaintiff arrived the Building. Yet the defendant has chosen not to call them without good reasons. Although Lam denies that the defendant has a caretaker with a rank called "supervisor" working at the Building, it is clear from his witness statement that the caretaker who had dealt with the plaintiff on that day was most likely to be Ting. Yet, Ting was not called to testify at the trial.

31. I therefore find as a fact that the plaintiff had asked the defendant to issue the written notice as claimed by him and that a handwritten notice on a A4 size paper was issued and displayed by the defendant at the notice board of the lift lobby prior to the occurrence of the Accident.

32. However, I do not believe that the plaintiff had brought with him a plastic warning sign to the Building before he carried out the repair work. According to a photo produced by the plaintiff in the trial bundle, the warning sign reads (in different font sizes): “CAUTION – MEN WORKING – Under permit-to-work or Sanction-for-test” ( 注意 - 人員正在工作 - 批准工作或試驗 ).

33. The plaintiff claims that he hung the plastic warning sign around the big black handle of the main switch as a warning to others before going up to the 5/F. The handle turns on or off the electricity supply to those floors. When the handle points downwards, it means electricity supply is connected. When the handle points upwards, it means the electricity supply has been disconnected. He claims that he had turned off the electricity supply (by turning the handle from a downward position to an upward position) before going up to the 5/F to fix the fuse box. As that main switch was located side by side with 2 other main switches that governed electricity supply to other floors, in my view, it would be obvious to anybody that someone had deliberately disconnected the electricity supply by turning the handle to an upward position. Together with the plastic warning sign (if one was actually displayed), nobody could have mistaken that someone had deliberately

turned off the electricity supply on the main switch and workmen were working on the electricity on those floors.

34. If what the plaintiff says about the warning sign is true, it means that someone must have deliberately turned the handle of the switch back to the “on” position while the clear plastic warning sign was still hanging over it. In my judgment, that is rather unlikely. First, the switch was located at a back staircase near to a locked metal gate where only the caretakers and residents who had the entry code could get in. Second, the main switch was located at a rather high up position near the ceiling where a person have to stand on a ladder in order to reach to the handle. Third, turning the handle back to the “on” position would require deliberate force and is not something that could be done by someone knocking against it accidentally.

35. Hence, I believe the more likely scenario is that the plaintiff had not brought with him the plastic warning sign as alleged and therefore no warning sign was hung over the main switch after he had turned it off. Then someone, most likely a resident or caretaker of the Building, without the knowledge that electrical work was going on in another part of the Building, came along and found that the main switch had been turned off, climbed up a ladder and turned the handle down to re-connect the electricity supply, thus causing the electrical shock to the plaintiff.

36. I therefore find as a fact that the plaintiff had not brought with him the plastic warning sign and no such sign was hung over the handle of the main switch to the 1/F to 5/F power supply. However, I do

accept that the plaintiff had turned off the power supply on the G/F before going to fix the fuse box on the 5/F.

37. Before discussing liability, I would like to briefly mention the defendant's only witness evidence here. In short, I do not find Lam's evidence to be credible for the following reasons.

38. First, his claim that he did not know that there was an accident happened to the plaintiff on the day of Accident until the latter issued the SCT proceedings is something I find hard to believe. It is obvious that as chairman of the incorporated owners, he needed to give authorization to the caretaker to agree on the repair charge with the plaintiff. I believe that either he or another committee member must have done that. Otherwise the plaintiff would not have agreed to proceed with the repair on that day. Further, I believe that the plaintiff was only able to agree the repair charge with the caretaker after arriving the Building and after the caretaker took instructions from the chairman on the phone or one of the committee members present at the scene.

39. Further, I believe that the just because there was no mention of the Accident in the minutes of the committee meeting which took place that evening does not mean that the Accident did not happen at all. As the plaintiff only reported the matter to Hung Hom Police Station sometimes after 7:00 pm on that day and attended the A&E of QEH sometime after 8:30 pm, I do not find it surprising that the committee did not discuss the matter in the meeting. To me, it was still very much a developing situation then.

40. More importantly, it is clear that Lam has no personal knowledge about the Accident itself. Instead, the caretaker Ting has. Whether he was the same supervisor of whom the plaintiff has mentioned in his evidence matters very little. What is more important is that he was the person who has been mentioned in the defendant's defence as someone who has personal knowledge about the whole matter. Yet the defendant has chosen not to call him to give evidence at the trial and has not offered any explanation as to why he could not be called. This is despite of the fact that a very detailed witness statement has been filed on Ting's behalf prior to trial. In my view, adverse inferences can be drawn against the defendant for the failure to call such an important witness in this case : See *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Ors* (unreported) CACV 91/2012 per Kwan JA at §106-107. I will so draw such inference against the defendant.

41. I also do not believe Lam when he stated that the warning sign was placed by China Light & Power ("CLP") on the day of the Accident. Not only there is no evidence to suggest that there was any repair work being carried out by CLP on that day, the allegation that he had only noticed there was such a warning sign 2 or 3 days after the Accident is simply not credible at all. Lam's evidence is that when CLP workers came to work at the Building they would usually take with them a warning sign similar to the one shown in the picture in the bundle. However, there is no suggestion that this was the same sign as the plaintiff had allegedly brought along with him on the day of the Accident.

*LIABILITY*

42. Based on the above findings on fact, I would now proceed to discuss the liability of the plaintiff and the defendant in this case.

43. The plaintiff's case against the defendant is based on (i) negligence; and (ii) breach of statutory duty.

44. In relation to the breach of statutory duty, the plaintiff claims there were breaches of (i) the common duty of care under the Occupier's Liability Ordinance, Cap 314 ("OLO"); and (ii) section 20 the EO.

45. The plaintiff also relies on the doctrine of *res ipsa loquitur* in the statement of claim. However, it is clear that the doctrine has no application in a case like this and I do not need to discuss it here.

46. Mr Tim Wong, the plaintiff's counsel, in his closing submission also referred to sections 18(1) & 34I of the Building Management Ordinance, Cap 344 ("BMO") to say that the defendant owed the plaintiff a duty under the BMO to do all things reasonably necessary for the enforcement of the obligations contained in the DMC. However, as the same has never been pleaded in the statement of claim, it is not necessary for me to consider them.

*Negligence*

47. For the issue of negligence, despite more than 20 particulars have been pleaded against the defendant, the plaintiff's real complaints against the defendant are:-

- (1) causing or permitting the electricity of the fuse box to be connected while the plaintiff was doing the work;
- (2) failing to issue any notice in the Building in relation to the electrical work to ensure that the electricity to the Building would not be connected;
- (3) failing to give or ensure adequate and effective warning was placed over the main switch on the G/F of the Building to prevent electricity of the Building from being connected; and
- (4) failing to place any barrier, fencing or guard to isolate the main switch in the staircase of the Building.

48. For the breach of the common duty of care, the plaintiff relies on the same particulars as those he has pleaded under the particulars of negligence. Therefore, the factual considerations are the same as those falls under the consideration of the issue of negligence.

*Occupier's liability*

49. As the occupier of the premises, there is no doubt that the defendant owed a duty of care to the plaintiff to see that he will be

reasonably safe in using the premises for the purpose for which he is invited or permitted by the defendant to be there: section 3(2) of the OLO.

50. However, the degree of care varies depending on the circumstances of the case. Thus, if an occupier expects that a person, in the exercise of his calling, like the plaintiff herein as a registered electrician, will appreciate and guard against any special risks ordinarily incident to it, then in so far as it is possible, the occupier should leave him free to do so: section 3(3) of the OLO.

51. In determining whether the occupier of the premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that, *inter alia*:

“where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.” :section 3(4) of OLO.

52. Mr Poon for the defendant relies on the House of Lords case of *Ferguson v Welsh* (1987) 1 WLR 1533 to say that there is a distinction between “activity fraud” (sic) (to which I think he means “activity fault”) and “occupancy duty” under the common duty of care. In that case, the House of Lords held that even on the assumption that there was evidence that was capable of establishing that the plaintiff was an invitee of the council for the purpose of demolishing the building owned by the council, the plaintiff had no claim against the Occupiers’ Liability Act 1957 (the



English equivalent to the OLO) or at common law. The House of Lords held that even if the plaintiff was a lawful visitor under s 2(2) of the 1957 Act and a common duty of care was owed to him, the council would still have a valid defence under s 2(4) because the council had engaged a contractor whom it had reasonable grounds for regarding as competent.

53. The House of Lords stated that the 1957 Act is designed to afford some protection from liability to an occupier who has engaged an independent contractor who has executed work in a faulty manner. Further, the protection afforded covers liability from dangers created by a negligent act or omission by the contractor in the course of his work on the occupier's property: per Lord Keith of Kinkel at 1560 D-F.

54. Lord Goff of Chieveley stated the following at 1563H – 1564C in the case:-

“There is no question as, I see it, of Mr. Ferguson's injury arising from any such failure; for it arose not from his use of the premises but from the manner in which he carried out his work on the premises. For this simple reason, I do not consider that the Occupiers' Liability Act 1957 has anything to do with the present case.

I wish to add that I do not, with all respect, subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupiers' Liability Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause the injury to the employee. *I have only to think of the ordinary householder who calls in an electrician; and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that, in ordinary circumstances, the householder*

*should be held liable under the Occupiers' Liability Act 1957, or even in negligence, for failing to tell the man how he should be doing his work."* [emphasis added]

55. I would respectfully agree with the principles laid down in *Ferguson v Welsh*, in particular the comments made by Lord Goff cited above. However, in our case we are not talking about an ordinary householder but an incorporated owners of a building who owes a duty to visitors like the plaintiff as well as other occupants of the Building.

*Section 20 of Electricity Ordinance*

56. The plaintiff alleges that the defendant was in breach of section 20 of EO which states as follows:-

- “(1) An owner of an electrical installation shall not connect to his installation anything that he knows or ought reasonably to know is likely to cause an electrical accident.
- (2) Proof that a defendant connected something to his electrical installation that was likely to cause an electrical accident is, in the absence of evidence to the contrary, proof that the defendant knew or ought reasonably to have known that his connection of the thing was likely to cause an electrical accident.
- (3) If an owner knows that the condition of his electrical installation is likely to cause an electrical accident he shall immediately have it rectified.”

57. I do not think section 20 applies in our case.

58. First, I do not consider the Accident was caused by the electrical installation at the Building that the defendant knew or reasonably ought to know that would likely cause an electrical accident.

59. Second, the Accident was not caused by the connection of “something” to the defendant’s electrical installation that was likely to cause an electrical accident.

60. Third, there is no evidence to suggest that the Accident was caused by defendant knew about the defective condition of his electrical installation and did not doing anything to rectify it.

61. Lastly, it is clear that the Accident was caused by the failure of the parties in placing sufficient warning notice over the main switch rather than due to the defects of the electrical installation.

62. For those reasons, I do not think section 20 of the EO applies.

*The plaintiff’s liability*

63. In my judgment, the Accident in our case was mainly caused by the failure of the plaintiff in displaying a warning notice on the main switch. As a registered electrician who was called to the Building to fix the fuse box, the plaintiff must be fully aware of the danger of someone who would accidentally turn on the main switch unless either it was guarded by someone or if a clear warning sign was displayed over it. In this case, as a matter of fact, I find the plaintiff had done neither. He could have asked his son to stand guard over the main switch while he was fixing the fuse box on 5/F or hung a clear sign on the main switch to warn others of the danger. Yet, as a registered electrician, who was

invited to the premises to answer “the calling” of his trade, the plaintiff has in my view failed to take care of his own safety.

64. Mr Wong for the plaintiff submits that main concern in this case is whether the electricity was suddenly connected again due to the negligence of any committee members, servants or agents. In other words, the question he asks is whether the committee members, servants or agents of the defendant, acting on behalf of the defendant, had allowed the danger or hazard to occur due to their omission to act. In this respect, he relies on the well known cases of *Wheeler v Copas* [1981] 3 ALL ER 405 and *Eden v West & Co* [2003] PIQR Q 16.

65. I would have agreed with Mr Wong’s proposition had this case not involved with an electrician who was invited to the Building to exercise the skill and calling of his profession or trade. In this regard, the case of *Fung Mei Fan v Tung Wah Group of Hospitals* DCPI 959 of 2006 relied on by the plaintiff can be easily distinguished as that involved an ordinary employee not someone who was answering a special calling of his trade.

66. In my judgment, the defendant has acted reasonably in entrusting the electrical work to the plaintiff who was a registered electrician and held himself out as having the requested skill and competence as indicated by his name card. I believe that the caretaker has followed the instructions of Lam in locating a qualified electrician nearby the Building in order to carry out the repair work. Further, through Ting, the defendant has satisfied itself that the plaintiff possessed

the necessary qualification and was able to provide such service in a competent manner at the Building.

67. In my judgment, while the caretaker and/or the 2 committee members present must have known or ought to have known that the connecting of the electricity at the Building, unless adequate precautions are taken, would likely cause an electrical accident, they would have to rely on the judgement and skill of the plaintiff as a qualified electrician to advise them as to what precautions they should take in the circumstances. In this case, as I found as a fact, the plaintiff has only advised them to place a warning notice at the notice board at the lobby. The plaintiff himself went to turn off the main switch but did not place a warning sign over the switch itself nor did he ask the defendant to do so.

68. Lastly, to prevent anybody from accidentally turned on the main switch, the plaintiff could have asked his son to stand guard over the main switch while he was fixing the fuse. However, the plaintiff had not done that before the Accident occurred. The fact that he has asked his son to do that after the Accident indicates that he must have felt the need to do so.

69. In the circumstances, I consider that the main responsibility in the cause of the Accident lies with the plaintiff in this case.

*The defendant's liability*

70. As I have found above, the defendant had issued a written notice and displayed it at the lift lobby as requested by the plaintiff.

While the notice by itself would not be sufficient to prevent the Accident, this was the only precaution that they were asked to take by the plaintiff and they had complied with the request accordingly.

71. In my view, there is no doubt that it was the duty of the defendant to ensure that no harm would be caused to the plaintiff while he was performing the electrical work, whether they are duties owed under the OLO or at common law. However, such duty in my view is not an absolute one. It is a duty to take reasonable care of the persons invited to the premises, the degree of which varies according to whether the person was answering a special calling of his trade on the premises. In this case, I am of the view that by simply issuing and displaying the written notice at the lobby area would not be sufficient precaution to prevent the Accident. In my judgment, the defendant should have ensured that a warning sign be hung over the main switch of the electricity. If the plaintiff had failed to bring along with him such a written sign and placed it over the main switch itself (as I have found in this case), it is my view that the defendant should have provided such a sign and to make sure that it was displayed over the main switch. If such a warning sign was not available, then I am of the view that the defendant should have placed a written warning notice over the main switch in order to warn others of the ongoing electrical work. Alternatively, the defendant should have placed a caretaker or security guard over the back staircase area during the relatively short time it would take the plaintiff to carry out the repairs. This would have ensured that no one would come along and accidentally turn on the main switch and thereby causing an accident.

72. It seems to me that the defendant, besides engaging a registered electrician and issuing a warning notice at the lift lobby according to the request made by the plaintiff, had done little else in this case to ensure that the main switch to the electrical supply would not be accidentally connected by someone while the plaintiff was carrying out his work.

73. In my view, the failure to ensure that such an important warning sign, or any warning sign or notice, was displayed over the main switch was a negligent act which renders the defendant partly liable for the Accident.

*The respective liability of the parties*

74. While the defendant was liable for the accident, in my judgment, the main culprit of the Accident was the plaintiff himself. As a registered electrician who was invited to the premises to answer the calling of his trade, he has failed to take the most basic care of himself by bringing along with him a warning sign and displayed it over the main switch. In my judgment, the main responsibility in causing the Accident must lie with him.

75. In a case where the defence of contributory negligence is raised, the court will take into consideration of two elements, namely, causation and blameworthiness: See *Chung Kei v So Yiu & Ano t/a Wai Yip Plastic Metal Factory & Ors* [1987] 1 HKC 173.

76. If a material breach of statutory duty can be established against the defendant, then the standard by which the plaintiff's contributory negligence is judged is less exacting than that used for ordinary negligence: (See *Li Man Yuen v Li Chung I t/a VF Electric Manufacturing Co* [1991] 2 HKC 230; *Li Tai Foon & Liu Tak Fun v Chan Chu trading as Chan Chu Kee* HCPI 468 of 1995; *Siu Sau Yung v Tak Wing Contractors Ltd & Ors* HCPI 1139 of 1996; *Poon Hau Kei v Hsin Chong Construction Co Ltd & Ors* HCPI 1333 of 1998).

77. However, as I found in this case, there was no breach of statutory duty here. The defendant was only negligent in not ensuring that a warning sign was displayed over the main switch when the plaintiff had failed to do so himself. Thus, the above cases would not apply in this case.

78. Balancing all the circumstances of this case, I consider that an appropriate level of contributory negligence on the part of the plaintiff in this case should be at 75%.

### *QUANTUM*

#### *The plaintiff's injuries*

79. The injuries sustained by the plaintiff in the Accident could only be described as minor. When he attended the A&E of QEH the same evening after the occurrence of the Accident, it was found that he had sustained a "superficial burn" over the front part of his neck only. The clinical diagnosis was neck burn injury. He received the 1<sup>st</sup> of his 3



anti-tetanus injections and was discharged on the same day. He was followed up at the Kwun Tong General Out-patient Clinic (“KTGOPC”) on 3 further occasions in January 2009 and attended the A&E of QEH again on 16 January 2009 for neck pain.

80. The plaintiff attended the KTGOPC on 2 further occasions in February and October 2009 respectively to complete his 2<sup>nd</sup> and 3<sup>rd</sup> anti-tetanus injections.

81. The plaintiff was granted a total sick leave of 9 days only and did not require any hospitalization as a result of the Accident.

82. The plastic surgery experts appointed by the parties have jointly examined the plaintiff. In the joint medical report of Dr Francis Ho Wing Yun and Dr Chow Sik Kuen dated 11 April 2013, the experts opined that the Accident has left little impact on the plaintiff, whether from a cosmetic disability or that of a loss of earning capacity (“LEC”) point of view. Dr Chow for the plaintiff assessed the permanent cosmetic disability at 1% while Dr Ho for the defendant assessed that at 0%. Further, Dr Chow assessed the LEC at 0.5% while Dr Ho assessed at 0%. In any view, this is negligible and has no real impact on his earning capacity and his ability to return to work as an electrician.

83. The plaintiff has frankly admitted to the experts at the joint examination that his daily activities were not affected by the Accident nor was his earning ability.

84. As shown in the photo taken by the experts at the examination in April 2013, the scar is not obvious. The experts described it as a slightly pigmented scar over the anterior part of the neck measuring 110 mm x 90 mm. Part of the scar is concealed under the chin and becomes noticeable only when the neck is fully extended. The experts noted that the plaintiff has a dark complexion. The neck movement is not affected. There is no dispute that the scar was caused by the Accident.

85. By the time of trial, a hardly noticeable faint pigmented scar can be seen in his neck area.

86. Dr Chow recommended 15 sessions of laser treatment to improve the pigmentation. Dr Ho considered that it is not necessary.

87. The plaintiff's main complaint is the "unsightly scars over the neck". He also alleges that the scars tend to cause itchiness most of the day and is worse during hot weather.

88. I am of the view that the plaintiff has much exaggerated his complaints. During the entire time when he gave evidence in the witness box (which lasted almost a day), I have not noticed the plaintiff showing any sign of discomfort or itchiness over his neck. Under cross-examination, he said the scar would become itchy when he sweats and it would therefore affect his work and hence earning ability. However, this is totally contrary to what he had told the experts during the examination. Although he has mentioned to the experts about the itchiness, particularly in hot weather, he also told them at the same time that his earning had not

been affected. In evidence, the plaintiff also mentioned about the need of treating his neck with wet towels and oilment when he returns home from work each day. This was however never mentioned to the experts during the joint examination nor was it mentioned in his 2 witness statements.

89. The plaintiff also mentioned that he had received laser treatment 1 year after the Accident which was paid for by his lawyers. This however was never mentioned in the statement of damages or his witness statements. It was also not mentioned in the joint medical report. When pressed, the plaintiff changed his story to say that it was for assessment only. However, no report or receipt has been produced to support the fact that the plaintiff actually underwent such laser treatment or assessment. Thus, the plaintiff's present complaints regarding his neck condition are at best questionable.

90. Based on the aforesaid, I shall assess the damages under the following headings.

(A) *Pain, suffering and loss of amenities ("PSLA")*

91. I was referred to a number of decided cases by counsel to determine the appropriate PSLA award in this case.

92. Mr Wong on behalf of the plaintiff referred me to the cases of *Leung Pui Yiu v Wong Yin Kuen* HCPI 453/2000, *X v Y* DCPI 229/2002, *Susi Yanti v Chu Shiu Chuen* HCPI 1176/2000 and *Leung Ka Yee v L & Y Beauty Centre Ltd* DCPI 196/2003 where PSLA awards ranging from HK\$75,000 to HK\$225,000 were made in those cases. He

submits that an appropriate PSLA award after taking into account of the case of *Chan Pui Ki and Choy Chung Shing v Ng Ho Chun* [2000] 2 HKC 667 should be in the sum of HK\$150,000.

93. Mr Poon for the defendant referred me to the cases of *Chan Tsz Sing v Lo Ching Pong & Ors* (unrep) CACV 176/2004, *Leung Ka Yee v L & Y Beauty Centre* (unrep) [2003] DCPI 196/2003 and *Lam Man Yin v Choy Tak Fu* (1985) HKCFI 524 where PSLA awards ranging from HK\$25,000 to HK\$75,000 were made. He submits that an appropriate award for PSLA in this case should be at HK\$25,000.

94. In my view, the plaintiff's injury comes nowhere close to those experienced by the victims in the cases referred to by Mr Wong. Even in *Leung Ka Yee, supra* where a sum of \$75,000 was awarded for PSLA, the plaintiff in that case sustained four columns of rectangular hyper pigmented scars on her back covering most of her upper and lower back which caused her much embarrassment and distress. The plaintiff's injury is much less serious than that. The plaintiff's injury is also less severe than those sustained by the plaintiff in *Chan Tsz Sing, supra* referred to by Mr Poon where the Court of Appeal awarded a sum of \$70,000 for a plaintiff who had sustained multiple abrasions and lacerations on the forehead and eyebrow. In that case, the victim had multiple abrasion scars on the forehead that were irregular but there was no hypertrophy or contracture. There was a 5 x 25 mm scar immediately under the right eyebrow that was obvious, with irregular surface and margin, elevated and more pigmented than the adjacent skin.

95. In our case, the plaintiff only suffered from a “superficial burn of the neck” in the Accident that resulted in a slighted pigmented scar over the neck. The scar is hardly noticeable due to his dark complexion. Further, the scar has not affected his daily living activities and working capacity. In my judgment, a sum of HK\$40,000 should be more than sufficient to cover the award for PSLA.

(B) *Loss of pre-trial earnings*

96. The plaintiff is the sole proprietor of Chiu Man Water, Electrical and Air-conditioning Engineering. In the revised statement of damages (“RSD”), the plaintiff claims that his average income at the time of the Accident was at HK\$30,000 per month. Yet the profits and loss accounts of the business filed for tax purposes reveal that the business had been making a loss in the years of 2007/08, 2008/09 and 2011/12. Nevertheless, during those years, the plaintiff drew a monthly salary of HK\$18,000 for himself. Thus, I think it is reasonable to use HK\$18,000 to represent his monthly income.

97. The plaintiff was granted a total of 9 days as sick leave after the Accident.

98. His loss of income, including MPF, during the pre-trial period will be at HK\$5,670 (\$18,000 x 9/30 x 1.05). I shall make this award to represent his loss of pre-trial earnings in this case.

(C) *Loss of earning capacity ("LEC")*

99. The plaintiff originally claimed a sum of HK\$180,000 under the RSD as LEC in this case, based on a 6 month loss of income at the estimated earnings at HK\$30,000 per month. By the time of the closing submissions after all the evidence has been heard, the plaintiff's counsel reduced the claim to HK\$54,000 based on a monthly income of HK\$18,000 and for 3 months only.

100. The LEC claim is made on the basis that due to the plaintiff's injuries as a result of the Accident, he suffers from "pain, redness and itchiness" over his neck when he sweats and "(A)ccordingly, (the plaintiff) has difficulties working for long periods in hot weather during the summer." The plaintiff further relies on the fact that he has to return home to apply wet towels over his neck and to put oilment on the site. Hence, the plaintiff submits that there is a "real risk" that the plaintiff may be thrown into the labour market in the future because of his disabilities.

101. With respect, there is absolutely no basis for the plaintiff to make a LEC claim in this case.

102. First, the plaintiff himself told the experts that his working ability was not affected by the Accident and the experts both opined that the plaintiff is able to resume his pre-injury occupation as a licensed electrician. Dr Chow, the plaintiff's expert, only assessed the LEC at 0.5% which is totally negligible.

103. Second, his claim that the itchiness in his neck would affect his working capacity was only made for the first time in the witness box when he said he needed to return home to apply wet towels and oilment on it. I am sure this is not true and was only made up by the plaintiff when he gave evidence.

104. Third, there is no evidence to suggest that he has to take time off from his work after the Accident due to the injury sustained by him. There is simply no evidence to suggest that he will suffer any risk of losing his present employment and will be “thrown into” the open labour market due to the injuries sustained in the Accident.

105. I therefore reject the plaintiff’s claim for loss of earning capacity.

(D) *Future loss of earnings & medical expenses*

106. The plaintiff claims a future loss of earnings for 15 days based on Dr Chow’s recommendation that he should undergo 15 sessions of laser treatment in future for the improvement of the scar and one day sick leave will be required after each session. The plaintiff also claims the estimated cost for those laser treatment at HK3,000 for each session and for 15 sessions at a total sum of HK\$45,000.

107. I do not agree with Dr Chow’s view that the plaintiff will require such laser treatment in future. In this regard, I prefer the opinion of Dr Ho. In my view, the plaintiff’s injury resulting from the Accident is minor and negligible. I agree with Dr Ho that the slightly pigmented scar

over his neck has no effect on both of his social and working life. His dark facial complexion makes the scar barely noticeable. Further, a significant part of the pigmented scar is shadowed and concealed by the natural position of the overhanging chin and jaw line. Thus, the slightly pigmented scar only becomes socially visible when he fully extends his neck.

108. Given the plaintiff's age, occupation and lack of social life, I do not see how the laser treatment, which does not carry any guarantee of improvement and will still leave residual pigmentation according to Dr Ho, will be able to help to improve his life and look in this case. Even according to Dr Chow, the laser treatment will only improve the pigmentation. It has not been suggested that it will improve his quality of life. I am of the view that laser treatment is not warranted in this case and I will therefore reject the claim for such treatment and the associated claim for future loss of earnings for the expected sick leave to be taken after the treatment.

(E) *Special damages*

109. I would allow the agreed sums of HK\$285.50 for medical expenses at the government hospitals and clinics and HK\$1,500 for tonic food in this case. The total special damages awarded will be at HK\$1,785.50.



*Summary of damages*

110. In the aforesaid premises, on a 100% liability basis, I would make the following award as damages in this case:-

	HK\$
(A) PSLA	\$40,000.00
(B) Pre-trial loss of earnings	\$5,670.00
(C) Loss of earning capacity	nil
(D) Future loss of earnings & medical expenses	nil
(E) Special damages	\$1,785.50
	<hr/>
	\$47,455.50

111. After taking into account of the 75% contributory negligence on the part of the plaintiff, the damages I will award in favour of the plaintiff in this case will be in the sum of HK\$11,864.00 (\$47,455.50 x 25%).

*Interest*

112. The plaintiff is entitled to interest at 2% per annum for the award of damages from the date of issue of writ to date of judgment, thereafter at judgment rate. For special damages, the plaintiff is entitled to interest at half of the judgment rate, which currently stands at 8%, from the date of the Accident to the date of judgment and thereafter at judgment rate.

*Costs*

113. Costs will normally follow the event. In this case, although the plaintiff has succeeded in his claim, the award of damages he recovered is within the jurisdiction of the SCT.

114. In *Cheung Yu Tin Alvin v Ho Hon Ka* (2006) 3 HKC 473 at §§46-48 Cheung JA stated the following:-

“46. Ultimately the question is whether it was reasonable to commence the action in the District Court. I fully recognize the expertise of District Court judges in dealing with personal injury cases but I do not agree that these claims should only be initiated in the District Court on account of this expertise even if the monetary claim comes within the Small Claims Tribunal jurisdiction. To do so will be contrary to the provision of s 5(1) and the schedule of the Small Claims Tribunal Ordinance which expressly confer jurisdiction on the Small Claims Tribunal on claims in tort of not more than \$50,000. This type of cases are in fact heard there as shown in the case of *Ho Wai Leung v Wan Chi Kuen* [2001] 2 HKLRD 284 (DC).

The only relevant consideration

47. The only relevant consideration is whether at the commencement of the action, in view of the nature of the injury of the plaintiff, it was reasonable to say that he would recover more than \$50,000. I recognize fully that assessment of damages is not an easy task but at the same time any lawyer who practices in this area must be able to tell whether the plaintiff has a serious injury or not and whether his injury has any impact on his earning. In this case from the available evidence one can see that the plaintiff's injury was extremely minor in nature and could not possibly have affected his earning. He could not possibly have recovered more than \$50,000. The sum of \$27,260 assessed by the judge was the best indication of the value of the claim.

The lawyer was duty bound to advise the plaintiff of the costs implications of suing in the District Court.

48. In the circumstances, it was unreasonable for the plaintiff to persist in pursuing the matter in the District Court, particularly, when the defendant had drawn his attention to the fact that the matter should be dealt with in the Small Claims Tribunal. The only proper way of exercising the discretion was to award costs to be assessed in a manner similar to the costs allowed in the Small Claims Tribunal.”

115. In this case, I noted that the plaintiff had issued proceedings at the SCT in September 2010 against the defendant claiming a sum of HK\$49,000 resulting from the Accident. In January 2011, the plaintiff applied to discontinue the claim against the defendant and an order granting leave to the plaintiff to discontinue the claim was made by the adjudicator on 19 January 2011. On 5 January 2012, the plaintiff issued the writ and served the statement of claim in the present proceedings, claiming a sum of HK\$458,290 plus interest and costs against the defendant. This sum was revised to HK\$520,485 under the RSD. I noticed also that the plaintiff is not on legal aid.

116. In my view, it is not difficult for any lawyer who practices in this area of law to see, at the time of commencement of the action, that the plaintiff’s claim is ridden with problems and his chance of success on liability is by no means certain. Further, any award for loss of past earnings, loss of earning capacity and PSLA in the light of the then available medical evidence must be relatively small. Yet the plaintiff’s lawyers saw fit to embark (and maintained) this claim in the District Court despite the fact that it was originally commenced by the plaintiff in the SCT.

117. I therefore would award costs on the basis as those allowed in the SCT, ie where no legal representation would be permitted and only reasonable expenses incurred by the litigants would be allowed.

118. I shall therefore make an order nisi that the defendant do pay the plaintiff's costs to be assessed in the manner similar to those allowed in the Small Claim Tribunal, such costs to be taxed if not agreed. The order will become absolute unless the parties apply to vary the same within 14 days from the date of this judgment.

( Andrew SY Li )  
District Judge

Mr Tim Wong, instructed by Alan Ho & Co, for the plaintiff

Mr Jackson Poon, instructed by Wong, Fung & Co, for the defendant