#### DCPI901/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 901 OF 2006

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| BETWEEN | LI SIU PING and LI SIU YU, the co-administratrices of the estate of CHAN KWOK HUNG, deceased | Plaintiffs |
|  | and |  |
|  | PERFECTA DYEING, PRINTING & WEAVING WORKS LTD (振裕染印織造廠有限公司) | Defendant |

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##### Coram: H H Judge Marlene Ng in Chambers (Paper Disposal)

Date of Hearing and Directions : 12th April 2007

Date of Plaintiff’s Further Written Submissions : 18th May 2007

Date of Defendant’s Further Written Submissions : 1st June 2007

Date of Plaintiff’s Reply Written Submissions : 8th June 2007

Date of Decision: 18th July 2007

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###### DECISION

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I. Introduction

1. Mr Chan Kwok Hung (“Deceased”) suffered fatal injuries whilst carrying out maintenance work on a high-speed textile printing machine (“Machine”) at the Defendant’s textile factory in the PRC (“Factory”).
2. The Machine had rotary screens situated above a conveyor belt (“Belt”) that conveyed textile to the Machine for printing. The Belt was driven, tensioned and supported by steel rollers (“Rollers”) situated underneath the Belt. There were 4 Rollers at the front portion of the Machine and 2 of them (ie Rollers nos.2 and 4) had in-running nips (ie pinch points) between the Rollers and the Belt.
3. The Plaintiffs claimed that in the morning of 6th June 2003 the Deceased (a maintenance technician) was instructed to investigate noises coming from the Machine and/or to apply lubricant to its Rollers. He crawled inside the Machine underneath the Belt from the front (a) to inspect the Belt or Roller no.2 and/or 4 and/or (b) to apply lubricant. The Machine was at first switched off, but was suddenly switched on without warning whilst the Deceased was still inside the Machine. His right arm/sleeve was caught by the in-running nip between the Belt and Roller no.2 and/or 4, and he was trapped and crushed to death as a result (“Accident”).
4. The accident report by 廣州市番禺區公安分局潭州派出所dated 7th June 2003 described the Accident as follows : “死者在車間給機器加油和檢查軸承時被卷入機器中，致右側被滾筒壓住致死”. In the Form 2 dated 10th June 2003 submitted by the Defendant to the Labour Department, it was said the Deceased “到車間給印花機加油和檢查軸承時，被卷入機器”. The certificate by 廣州市公安局番禺區分局大崗派出所dated 8th September 2006 stated the Accident happened when the Deceased “在該廠車間維修機器時，被機器滾筒卷入，至身體右側被滾筒壓住”.
5. Paragraph 4 of the written submissions by the Plaintiff’s solicitors dated 10th April 2007 summarised the particulars of negligence pleaded in the Statement of Claim as follows :

“…… the Plaintiffs pleaded, inter alia, that the dangerous parts of the Machine were not properly guarded, that no warnings about risk of injury was displayed on the Machine; that the Defendant failed to properly maintain the Machine and failed to provide a safe system of work, etc.”

1. The Defendant claimed the Machine was in operation when the Deceased crawled inside or the Deceased failed to give prior notice/warning to his co-worker(s) nearby not to switch on the Machine before crawling inside. The Defendant alleged the Accident was solely caused or contributed by the negligence of the Deceased who had 20 years’ experience as a maintenance technician.
2. The Plaintiff intended to adduce liability expert evidence from Mr A J Courtney (“Mr Courtney”) who is an associate professor of the department of industrial and manufacturing engineering of The University of Hong Kong (“Application”). Mr Courtney prepared an expert report dated 9th November 2004 (“Courtney Report”) pursuant to a site inspection on 7th October 2004 in the presence of the Defendant’s solicitors (“Site Inspection”). The Defendant objected to the Application.
3. On 22nd February 2007, the PI Master adjourned the Application and the Pre-Trial Review (“PTR”) to be heard before me on 12th April 2007. The Plaintiffs indicatedthey would have 2 witnesses as to fact, ie Madam Li Siu Ping (widow of the Deceased, “Widow”) and Mr Chan Wai Keung (eldest son of the Deceased, “Son”). The Defendant indicated it would also have 2 witnesses as to fact, ie Mr Chun Leung (“Mr Chun”) and Mr Wong Kwai Cheung (“Mr Wong”). The Plaintiffs further claimed the Defendant ought to make further discovery in respect of the documents relating to the Machine and the Accident.
4. Since witness statements had not been exchanged and the Plaintiffs’ request for further discovery had not been fully dealt with at the time of the PTR hearing, I was unable to adjudicate on the Application. I gave directions (i) for witness statements to be exchanged on or before 3rd May 2007 and (ii) for the Defendant to file and serve a further and better list of documents in respect of the following categories of documents in its possession, custody and power within 21 days :
5. investigation/accident report prepared by the Defendant’s loss adjusters and by the relevant authority in the PRC;
6. document(s) showing the Machine’s make, model and age;
7. installation handbook/manual of the Machine;
8. operation handbook/manual of the Machine;
9. maintenance handbook/manual of the Machine;
10. drawings of the Machine provided by the manufacturer;
11. maintenance/repair records of the Machine;
12. statements given to PRC government authorities or the Defendant for internal investigation, or to any other authorities after the Accident;
13. photographs of the Machine taken after the Accident.
14. The Defendant’s Supplemental List of Documents filed on 3rd May 2007 disclosed *inter alia* the following copy documents :
15. undated layout plan of the Machine;
16. statement given by Mr Chun to the Defendant’s loss adjuster Toplis and Harding (Hong Kong) Limited (“Toplis”);
17. statement given by Mr Wong to Toplis;
18. 11 photographs of the Machine taken by Toplis.

The Defendant claimed privilege over “[all] loss adjuster’s report(s) and investigation(s) compiled or obtained by the Defendant or its insurer in respect of the [Accident]”.

1. According to the written submissions by the Plaintiff’s solicitors dated 18th May 2007, they were informed that the Defendant did not have in its possession the documents listed in paragraphs 9(a), (c), (d), (e) and (f) above save for the document in paragraph 10(a) above.
2. According to Mr Wong’s affirmation dated 23rd May 2007, the Defendant had on a date unknown disposed of the purchase order and/or delivery note of the Machine and the documents in paragraphs 9(c), (e) and (g) above. Neither the Defendant nor any relevant authority in the PRC compiled any investigation/accident report in respect of the Accident. There was no prosecution by PRC government authority, so there were no documents in relation thereto. There were no exchange of letters or correspondence between the relevant government authorities and the Defendant. The Defendant also did not compile any duty list for the Deceased and his co-workers at the Factory’s machine maintenance department.
3. The Defendant filed a witness statement of 林穎鋒 (senior manager of Toplis, “Mr Lam”) exhibiting the copy statements referred to in paragraph 10(b) and (c) above as well as the witness statements of Mr Chun and Mr Wong. The Plaintiffs also lodged with the court the witness statements of the Widow and the Son. On/about 25th May 2007, the Defendant disclosed a copy of the User Manual for the Machine (“User Manual”) from which the document in paragraph 11(a) above appeared to have been extracted.

*II. Application*

1. On 12th April 2007, I directed the Application to be dealt with by paper disposal. I have considered the Plaintiffs’ written submissions lodged on 10th April, 18th May and 8th June 2007, and the Defendant’s written submissions lodged on 11th April and 1st June 2007.

*III. Defendant’s witness statements*

1. According to the Defendant, Mr Chun had been a printing worker at the Factory for about 4-5 years prior to the Accident. The Deceased and Mr Wong were respectively the maintenance supervisor and deputy maintenance supervisor of the machine maintenance department at the Factory.
2. Maintenance work was done on the Machine a day before the Accident and testing was scheduled for the following day (ie 6th June 2003). At about 8:00 am on that day, Mr Chun’s supervisor instructed him and 2 other printing workers to test the Machine. When textile was conveyed into the Machine after it was switched on, there were odd noises so the supervisor stopped the Machine and asked maintenance personnel to check the same.
3. 3 maintenance technicians (including the Deceased) came to inspect the Machine. Mr Chun did not pay attention to their work, but noticed the Deceased crawling into the Machine from the front and crawling out shortly afterwards whilst the Machine was switched off. Mr Wong also came over to inspect the Machine. The Deceased told him a Roller was making noises. Mr Wong and the Deceased at first thought there was not enough lubricant. Mr Wong therefore asked a maintenance technician to have a “加油工人” come over to apply lubricant, but the telephone call to place such instructions could not get through. Mr Wong then received instructions to deal with another problem and left.
4. Mr Chun confirmed the maintenance technicians seemed to say there was not enough lubricant, but the Machine still did not work properly after the Deceased applied lubricant to the Rollers from outside the Machine. After the other maintenance technicians left, the Deceased asked Mr Chun to switch on Machine. Mr Chun did not know why the Deceased asked him to do so, but he switched on the Machine at the lowest speed of operation. The Deceased again added lubricant from outside the Machine, but the Machine still did not work properly.
5. The Deceased told Mr Chun not to switch off the Machine. He then crawled inside the Machine holding an oil gun and a torch. Mr Chun was unclear about maintenance matters and did not know if this was dangerous. After about 6-7 minutes he heard a cry from the Deceased. Although Mr Chun did not understand Cantonese he thought there might have been an accident, so he immediately switched off the Machine. When he looked inside the Machine, he saw the right upper part of the Deceased’s body crushed by a Roller and called for help. Mr Chun did not know how the Roller crushed the Deceased.
6. Mr Wong said the Deceased as supervisor would normally direct subordinates to carry out maintenance work instead of carrying out such work himself. Although lubricant could be added from outside the Machine, a maintenance technician might have to crawl inside the Machine for inspection if the problem persisted after lubricant was added. In such circumstances, the Defendant required the Machine to be switched off, and warning notices were posted at the Factory and on each machine.
7. No repairs were carried out on the Machine after the Accident, but the Machine did not make any further noises when it was subsequently used. Mr Wong believed the Deceased correctly applied lubricant to the Machine, which still made noises for a while because it took time for the lubricant to take effect.

*IV. Plaintiffs’ witness statements*

1. For about 20 years prior to his death, the Deceased worked as a maintenance technician/supervisor. When he was employed at the machine maintenance department of the Factory, he had some subordinates but often carried out maintenance work himself. The Widow told Toplis the Deceased was all along in good health and did not have any drinking habit.
2. On 6th June 2003 after the Accident, Mr Chan Biu (ie the Factory manager also known as Uncle Biu, “Mr Chan”) identified to the Son at the hospital the 2 co-workers working with the Deceased at the material time. On the following day, Mr Chan and the vice Factory manager Mr Hung showed the Machine to the Widow and the Son, and Mr Chan gave an account of the Accident. Mr Chan told them the Deceased crawled inside the Machine (which was then switched off) for inspection. The Deceased had 2 co-workers assisting him, one for operating the on-off switch and the other near to the Deceased for relaying messages between the Deceased and the switch operator. At the time of the Accident, whilst the Deceased was still inside the Machine, the co-worker near to the Deceased took a call on his mobile telephone and the switch operator turned on the Machine without such message relayed to him. The Deceased was drawn in by a Roller and suffered fatal injuries.

*V. Courtney Report*

1. The Courtney Report was based on the Site Inspection during which *inter alia* Mr Chan was present. Mr Courtney inspected the Machine and measured the overall dimensions of the front area of the Machine. He found Mr Chan unable or unwilling to offer relevant information in relation to the Accident or the Machine.
2. Mr Courtney referred to the reports mentioned in paragraph 4 above, a letter from the Defendant’s solicitors dated 2nd March 2004 which described the Accident largely along the lines in the Defendant’s witness statements, and a statement from the Widow largely along the lines in the Plaintiffs’ witness statements.
3. Mr Courtney noted that the Deceased was instructed to investigate noises coming from the Machine. Whatever the Deceased might or might not have done in respect of lubricating the Machine, the noises continued. The Deceased crawled inside the Machine to investigate and/or apply lubricant, but his right arm was caught by a Roller and he was drawn into the Machine. Mr Courtney did not know the full nature of the injuries, but the areas affected were said to be the Deceased’s skull/scalp, chest, forearm, upper arm and shoulder with no mention of the hand.
4. Mr Courtney noted that the accounts by the Defendant’s solicitors and the Widow differed as to whether the Machine was switched on or off when the Deceased crawled inside. He noted the Defendant’s solicitors claimed “there was warning (sic) forbidding workers to climb inside the [Machine] without turning it off”, but Mr Courtney noted no such warning was in evidence at the time of the Site Inspection.
5. In paragraphs 4.2-4.3, 4.7-4.11, 4.14-4.16 and 4.40-4.43 and Figures 1-14 and 20-22 (comprising drawings and photographs) of the Courtney Report, Mr Courtney explained the structure of the Machine including its cleanliness and condition, the absence of warning signs on or in the vicinity of the Machine, the interplay between the Rollers and the Belt when the Machine was in operation, the access to the underside of the Machine *via* the front, the clearance at the front area and underside of the Machine, the floor condition particularly in relation to the underside of the Machine, the location of the in-running nip hazards and the likely speed range of the Machine.
6. Given the aforesaid, particularly as (a) the only entry into the Machine was from its front (paragraph 4.8), (b) there was sufficient clearance at the front of the Machine under the Belt for a person to stretch out and crawl under (paragraph 4.9), and (c) the centre area under the Belt at the time of the Site Inspection was full of foul smelling liquid (paragraph 4.10) and (according to the Son – see also the photographs by Toplis referred to in paragraph 10(d) above) much wetter at the time of the Accident (paragraphs 4.11-4.12), Mr Courtney opined that the Deceased would have crawled from the front of the Machine with a clearance of 23 inches onto the dryer part of the floor near the inside edge of the Machine where there was a clearance of 30 inches under the Belt (paragraphs 4.16 and 4.13).
7. Since the only obvious in-running nip hazards where the Deceased would have been drawn in were at Rollers nos.2 and 4 (paragraph 4.14), whether the Machine was running or not, the Deceased must have crawled for at least 10 feet inside the Machine to either Roller (paragraph 4.18 and Figures 4 and 15-16) and the in-running nip hazard would have been above him. In the circumstances, whether the Deceased adopted a crawling posture, a prone posture on his front or a prone posture on his back (Figures 14, 18 or 19) or lying on his side (paragraph 4.20), Mr Courtney found it hard to see how the Deceased’s arm, hand or clothing could have been caught unless he pressed or thrusted his arm firmly upwards into the nip hazard (paragraphs 4.19 and 4.21), which would have been an odd and unlikely action by the Defendant with the Machine running (paragraphs 4.22 and 4.31).
8. Given the in-running nip hazards at Rollers nos.2 and 4 and the Machine’s likely speed range of 15-260ft/min or possibly higher, Mr Courtney opined that crawling inside the Machine when it was running was “not the sort of thing a normally careful and experienced maintenance technician would do” (paragraphs 4.15-4.16) and it was therefore unlikely that the Deceased did so (paragraph 4.28). He added that it was even less likely for the Machine to be running at the time of the Accident if the Deceased had crawled to Roller no.4 because he would have to crawl under Roller no.3 which only had a clearance of 14 inches (paragraph 4.18 and Figures 4 and 17).
9. Mr Courtney opined that even though the normally inaccessible in-running nips of the Machine were above the Deceased and less likely to draw in loose clothing, they were still highly dangerous areas and should be guarded to prevent access to the hazards (paragraphs 4.24-4.27). In this respect, he referred to various established methods and standards of guarding danger points in a machine (paragraphs 4.25-4.26, 5.2 and 6.1-6.2).
10. Mr Courtney pointed out that although there were stop switches at both sides at the front and also at the back of the Machine, there was no stop button in the vicinity of the Deceased at the time of the Accident. Thus, the Machine could not be controlled by the Deceased or controlled from a location convenient for communication with him, so it would have been likely to have a person close to him to receive instructions and another person further away to control the Machine (paragraph 4.33). In the circumstances, Mr Courtney opined that the likely cause of the Accident was a co-worker failing to pay full attention to the job of switching the Machine on and off (paragraph 4.32).
11. In Mr Courtney’s opinion, the likely scenario was that the Deceased investigated noises from the Machine by having other workers communicate with him to stop and start the Machine at his request (paragraph 4.29) and he was caught unawares whilst holding the stationary Roller no.2 or 4 above him to (possibly) adjust his posture when the Machine was suddenly switched on thereby trapping his hand or clothing (paragraph 4.23).
12. In paragraphs 4.35-4.38 of the Courtney Report, Mr Courtney pointed out the Defendant should have conducted risk assessment for maintenance work to be on the Machine before such work was carried out. On the factual assumptions given by the Plaintiffs, Mr Courtney opined that the Machine should not have been switched on without the Deceased’s specific instructions and the full attention of all involved personnel. If one such worker was using a mobile telephone, he should not have simultaneously formed part of the communication link between the Deceased and the controls for the Machine. So on such factual assumptions, the Defendant failed to provide a safe system of work.

*VI. Legal principles*

1. The starting point are the following statutory provisions :
   1. Section 58(1) of the Evidence Ordinance Cap.8 states that “[subject] to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter [ie an issue in the proceedings in question] on which he is qualified to give expert evidence shall be admissible in evidence”.
   2. Order 38 rule 4 of the Rules of the District Court (“RDC”) states that “the Court may, at or before the trial of any action, order that the number of …… expert witnesses who may be called at the trial shall be limited as specified by the order”.
   3. Order 38 rule 6 of the RDC states that except with the court’s leave or the consent of all parties, no expert evidence may be adduced at the trial or hearing unless the party seeking to adduce the evidence has first sought and complied with directions of the court concerning pre-trial disclosure of the substance of the expert evidence sought to be relied on.
2. Admissibility of expert evidence is often determined before trial. In *Wong Hoi Fung v American International Assurance Co (Bermuda) Limited & anor* HCA4576/2001 (unreported, 8th October 2002) Chu J said as follows :

“11. Modern judicial authorities recognize that the court has inherent power to rule on the admissibility of expert evidence at a pre-trial stage : ***Woodford and Ackroyd v. Burgess*** [2000] CP report 79, **Ko Chi Keung v. Lee Ping Yan Andrew** [2001] 2 HKC 63 and ***Annabell Kin Yee Lee & Others v. Lee Wing Kim (May Lee) & Anor*** (unreported), HCA9522/1997. Where the proposed expert evidence is plainly inadmissible or irrelevant, the court ought to exercise its discretion to refuse the admission of such evidence. But where the court cannot form a clear view on the relevance of the proposed expert evidence or where it considers that the proposed evidence is clearly relevant, then it should grant leave for the evidence to be adduced at the trial : ***Ko Chi Keung v. Lee Ping Yan Andrew******(supra)***, at p.67 and ***Annabell Kin Yee Lee & Others v. Lee Wing Kim (May Lee) & Anor (supra)***, at p.15.”

1. Admissibility of expert evidence is dependent on certain conditions being satisfied, including *inter alia* that :
   1. the subject matter of the expert opinion must come within an area for which expert evidence may properly be adduced;
   2. the witness must be a qualified expert who can give evidence on the subject matter in question;
   3. his evidence must be relevant to the issues in the proceedings in question.
2. In respect of conditions (a) and (b) in the above paragraph, King CJ in *R v Bonython* [1984] SASR 45, a case cited in *The Final Report of the Chief Justice’s Working Party on Civil Justice Reform* (March 2004) para.596 at pp.315-316, said at p.46 as follows :

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction of experience is the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms party of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.”

1. Stuart-Smith LJ in *Liddell v Middleton* (1996) PIQR 36 succinctly summarised the proposition as follows : “…… An expert is only qualified to give expert evidence on a relevant matter, if his knowledge and expertise relate to a matter which is outside the knowledge and experience of a layman. ……” This is endorsed in a recent decision by Master B Kwan in *Chan Wai Ying the administratrix of the estate and on behalf of the dependants of Tsai Chung Yung deceased v Sin Kit Sang & ors* HCPI805/2006 (unreported, 31st May 2007, para.7). Although Deputy High Court Judge Gill allowed the appeal against the learned Master’s decision by his ruling of 10th July 2007, he did not disagree with such proposition. Indeed, he also relied on *Liddell* as the relevant benchmark.
2. On the requirement of “relevance”, Stuart Smith LJ in *Liddell* reminded that the reference to an “issue in the proceedings in question” related to a factual issue and not to a conclusion of law based upon such fact. Chu J in *Wong Hoi Fung* said as follows :

“12. …… the evidence must be relevant, in the sense that it is helpful to the court in arriving at its decision on one or more of the issues to be resolved : ***Barings plc (in Liquidation) & Anor v. Coopers and Lybrand & Ors***, Lexis Transcript, 9 February 2001, Evans-Lombe J at paras.44-45.”

Evans-Lombe J added that the court could still exclude expert evidence if it was of the view that calling such evidence would not be helpful to the court in resolving any issue in the case justly, eg where the issue to be decided was one of law or one on which the court could come to an informed decision without such expert evidence.

1. In road accident cases, the law as to when expert evidence on liability may be admissible has been succinctly set out in *Liddell* as follows :

“In some cases expert evidence is both necessary and desirable in road traffic cases to assist the judge in reaching his or her primary findings of fact.  Examples of such cases include those where there are no witnesses capable of describing what happened, and deductions may have to be made from such circumstantial evidence as there may be at the scene, or where deductions are to be drawn from the position of vehicles after the accident, marks on the road, or damage to the vehicles, as to the speed of a vehicle, or the relative positions of the parties in the moments leading up to the impact.

*In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence* of the marks on the road, the damage or whatever it may be.  What he is not entitled to do is to say in effect ‘I have considered the statements and/or evidence of the eyewitnesses in this case and I conclude from their evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point’.  These are facts for the trial judge to find based on the evidence that he accepts and such inferences as he draws from the primary facts found.  Still less is the expert entitled to say that in his opinion the defendant should have sounded his horn, seen the plaintiff before he did or taken avoiding action and that in taking some action or failing to take some other action, a party was guilty of negligence.  *These are matters for the court, on which the experts’ opinion is wholly irrelevant and therefore inadmissible.*

……

We do not have trial by expert in this country; we have trial by judge.  In my judgment, the expert witness contributed nothing to the trial in this case except expense.  For the reasons that I have indicated, their evidence was largely if not wholly irrelevant and inadmissible.  ……

*There has been a regrettable tendency in recent years in personal injury cases, both road traffic and industrial accidents, for parties to enlist the services of experts whether they are necessary or not.* When they are not necessary, they simply add to the already high cost of litigation and the length of the trial.  *In industrial accidents an expert may well be needed to explain complicated machinery or to give evidence of practice and safety procedure.* But in road traffic accidents it is the exception rather than the rule that expert witnesses are required. ……” (my emphasis)

In my view, there is no reason why the general principles referred to above should not also be applicable for the admissibility of expert evidence on liability in relation to industrial accidents.

1. It has been said the modern trend of personal injuries litigation is such that expert reports on liability are not normally allowed (see *Cheung Yuen Fan Sally v Hong Kong University of Science & Technology* HCPI106&107/2003, Master B Kwan (unreported, 13th March 2006)). Indeed, the learned Master referred to the judgment of Suffiad J in *Tong Ho Wing (an infant) by Chan Ho Mui his mother and next friend v Wong Fuk & anor* HCPI1369/1999 (unreported, 19th July 2000) and said there was a “general rule” that expert evidence on liability was not permitted unless it could be shown on sufficient grounds that an exception should be made. I also bear in mind the trenchant reminder by Seagroatt J in *Wong Hin Pui v Mok Ying Kit & anor* [2006] 1 HKLRD 856, 874-875 that both legal practitioners and the court should look hard and fast at the case before them and ask themselves what was really needed by way of expert evidence so as to avoid indiscriminate obtaining of such evidence.
2. However, I prefer to follow the approach stated in my Reasons for Decision in *Wong Chok Wai v Sun Chung Luen Chinese Products Company Limited* DCPI1839/2006 (unreported, 3rd April 2007), ie that the court should approach the particular circumstances of each case to consider whether it is justified on the criteria of necessity, relevance and probative value to adduce expert evidence on liability (*Chan Kwok Ming v Hitachi Electric Service Ltd* HCPI322/2002 referred to in *Arfan Muhammed v MPS Engineering Limited & anor* HCPI457/2003, Deputy High Court Judge Muttrie (unreported, 30th June 2005)).

VII. Discussion

1. The materials before me suggest that Mr Courtney is an expert in the area of industrial and manufacturing engineering, and the Defendant’s solicitors have not contended otherwise.
2. Given that the object is always that the court should reach a fully informed decision on whether or not there was negligence, the next question is whether Mr Courtney’s “knowledge and expertise” is outside the knowledge and experience of a layman so that it is “relevant” within the *Bonython* and *Liddell* sense or, to put it in another way, whether his opinion comes within an area on which expert evidence may properly be adduced.
3. The Defendant’s solicitors try to suggest that the issue on liability turns on the factual dispute as to whether the Machine was switched off or not when the Deceased crawled inside the Machine for inspection or maintenance. Whilst this undoubtedly is a key issue on liability, it is incorrect to say it is the sole issue on liability for the trial judge.
4. Apart from complaining that the Defendant failed to ensure the Machine would remain switched off whilst the Deceased was carrying out investigation or applying lubricant, the Plaintiffs have also in their pleadings averred that the Defendant was negligent in *inter alia* :
5. failing to devise/maintain a safe system of work for the Deceased, ie failing to (i) provide him with adequate health and safety precautions as to how to investigate noises coming from and to apply lubricant to the Machine, (ii) take reasonable care to prevent injury to him when he was investigating noises coming from and applying lubricant to the Machine, (iii) have suitable/sufficient risk assessment in relation to the maintenance work carried out by the Deceased at the time of the Accident, (iv) provide sufficient/competent co-workers for him to carry out such work, and (v) ensure/maintain proper and effective communication between him and his co-workers whilst he carried out such work inside the Machine, and by exposing him to a risk of injury which the Defendant by proper supervision/inspection ought to have known;
6. failing to ensure the 2 in-running nip hazards at Rollers nos.2 and 4 were effectively/sufficiently guarded;
7. failing to display warning signs on the Machine concerning risk of injury.

However, it will be fair to say that the Plaintiffs have not in their pleadings identified the particular defects in respect of the maintenance of the Machine that caused noises to come from the Machine in operation.

1. To adjudicate on the above issues of liability, it will be necessary for the trial judge to make factual findings on how the Accident happened. Although Mr Chun will give evidence as to whether the Machine was switched on or off at the time of the Accident, and his credibility and reliability in this respect can be tested by cross-examination, it is a crucial feature of this case that no available witness is capable of giving a reliable account of how the Deceased met with the fatal incident.
2. Mr Wong had left the scene by the time of the Accident. Mr Chun was standing nearby but was not looking into the underside of the Machine. He has confessed that he does not know how the Roller crushed the Deceased and he does not understand the Deceased’s cry in Cantonese. In short, there is no available witness who can give evidence as to (a) the Deceased’s distance, posture and position inside the Machine, (b) what he was actually doing there, (c) how his sleeve/arm got caught by the in-running nip, and (d) which Roller’s in-running nip drew him in and crushed him.
3. There is no detailed investigation report by the relevant PRC authorities that may shed light on how the Deceased met with the Accident. According to the Widow and Son, Mr Lam of Toplis was already carrying out investigations at the scene on the day after the Accident. The loss adjuster’s investigation report would have been based on observations made and information obtained very close in time to the Accident, but the Defendant claims privilege over such investigation report. The Plaintiffs dispute such claim, but pending resolution of such dispute, the Defendant’s privilege claim prevents such report from becoming available evidence in the present proceedings. I therefore need not be concerned with the argument by the Defendant’s solicitors that such report is useless in that the maker did not witness the Accident.
4. I also note that the documents referred to in paragraph 9(c), (d), (e), (f) and (g) above are not available and no duty list has been compiled for the Deceased and his co-workers (see paragraph 12 above). The Defendant’s solicitors try to brush this aside by submitting that “…… [Mr Wong] is in a position to explain to the Court any structure of the machine and how the machine operated”.
5. But Mr Wong’s statement to Toplis and his witness statement do not give any description of the structure (especially in relation to the underside of the Machine) and operation/maintenance of the Machine (other than the fact that lubricant could be added from outside the Machine, warnings were affixed to machines in the Factory and the Defendant required the Machine to be switched off whenever a maintenance technician crawled inside). Mr Wong does not explain the interplay between the Rollers and the Belt when the Machine was in operation and the dangers (if any) posed by and safety precautions (if any) against the in-running nip hazards when a technician had to crawl inside the Machine at the material time.
6. However, it is plainly evident from the aforesaid issues on liability that the structure, features, characteristics, operation, capabilities and safety measures (if any) of the Machine and the then good practice for carrying out repair/maintenance of the Machine will be pertinent to any determination on how the Deceased met with the Accident and whether the Accident was the result of negligence on the part of the Defendant and/or contributory negligence on the part of the Deceased. In my view, given the complexity of the Machine and of the interaction of its various parts, these matters are well outside the knowledge and experience that a witness and/or judge can bring for judicial determination on the issues on liability.
7. It is true the Defendant has now disclosed the User Manual (in the English language) and the layout plan of the Machine therein. But the User Manual contained about 190 pages of technical information that are not readily understood by an average lay witness or judge. Further, Mr Wong’s witness statement and/or his statement to Toplis do not say that he has read and/or understood the User Manual or that he is in a position to explain the relevant technical matters therein to educate and inform the court. Indeed, his statements do not refer to the User Manual at all.
8. The Defendant’s solicitors next suggest that the Plaintiffs’ photographs clearly show the structure of the Machine without any need for comments by an engineer. But in my view such photographs show the appearance rather than the structure of Machine and do not lend assistance to the task of ascertaining how the Accident happened and/or determining whether or not there was negligence. Although Toplis’ photographs show the underside and control panel of the Machine, the photographs on their own do not provide enlightenment on the operation of the Machine and/or the dangers or safety features (if any) posed by its structure.
9. On the other hand, the Courtney Report with the assistance of drawings and photographs explains the structure and characteristics of the Machine, and informs and educates on the possible position(s), posture(s) and action(s) of the Deceased within the confines of the underside of the Machine and in light of the Machine’s dimensions, characteristics, features, operation and capabilities at the time of the Accident, which may assist the trial judge in his determination as to how the Deceased got caught and crushed by the Machine.
10. The Defendant’s solicitors argue that the Courtney Report was irrelevant or inadmissible in that Mr Courtney made a lot of factual assumptions and did not witness the Accident, so he should not be allowed to speculate how the Accident would likely have happened, comment on whether it was likely the Deceased had crawled inside the Machine when it was running, or guess what the Deceased would likely have been doing inside the Machine just before the Accident.
11. Almost invariably, where expert evidence on liability is adduced, the relevant expert was not present at the time of the incident. But if the subject matter deserves expert opinion under the principles discussed above, the expert opinion is necessarily based on (a) facts observed by the expert and (b) assumed or accepted facts. In respect of (a), the expert’s factual observations must be stated and proved by him. In respect of (b), the assumed or accepted facts must be proved by the party adducing the expert opinion by some other way. Where expert evidence on liability is required, admissibility does not turn on whether the expert can give factual evidence as to what happened at the time of the incident. Rather, the expert should give a proper basis for his opinion by explaining how his special knowledge and expertise in an area of which he is an expert by experience or training applies to the facts in (a) and (b) above.
12. Further, the expert is not required to ignore witnesses’ accounts and limit himself to consideration of the physical evidence (eg the facts observed by him). His opinion should refer to witnesses’ accounts or assumed facts whilst recognising that ultimately it is for the trial judge to make the factual findings or to accept/reject a particular witness’ account. It is open to the expert to explain whether the physical evidence is or is not consistent with the account given by either party, which in my view does not usurp the function of the trial judge. Once the expert opinion is admitted, it is up to the trial judge to consider all the evidence and give such weight as he thinks appropriate to any part of the evidence if at all.
13. Thus, the proper question as refined by the particular circumstances of the present case analysed above is whether expert opinion in the area of industrial and manufacturing engineering is necessary, relevant and of probative value to assist the trial judge in resolving the issues on liability given that there is no direct eye-witness evidence as to the Deceased’s position, posture and actions inside the Machine, and as to how he was drawn into a Roller and met his end. In my view, the answer is in the affirmative.
14. The comment by Stuart-Smith LJ in *Liddell* in relation to industrial accidents, ie “…… an expert may well be needed to explain complicated machinery or to give evidence of practice and safety procedure”, is applicable here. As explained in paragraph 57 above, expert evidence as to the structure, condition, distance and overhead clearance of the underside of the Machine will be relevant to consideration of Deceased’s position, posture and actions just before the Accident. Expert evidence on the then good practice as to safety measures, warning notices and guards over danger points of printing or similar machines is properly admissible as being pertinent to *inter alia* whether there was a reasonably safe work environment and system of work for the Deceased at the material time.
15. The Defendant’s solicitors rely on the case of *Tong Ho Wing* where Suffiad J refused to allow the plaintiff to adduce expert evidence on liability from a traffic accident reconstruction expert. He noted that there were 2 eye-witnesses to the traffic accident and took the view that the plaintiff’s speed and the driver’s response were not matters which the trial judge would need expert evidence to assist him.
16. In my view, one should not include all expert evidence on liability into one category. It depends on the issues in the particular case. Sometimes, it involves areas where the court has sufficient experience (eg speeds of vehicles involved in traffic accidents) so it will not be right to adduce expert evidence. Even so, the special circumstances of the particular case in question may justify expert evidence (eg expert opinion on the attributes of a high performance sports car where there is no reliable account of speed and distances as in *Chan Wai Ying*). Conversely, there are other areas in which the court may have some (but not confident) understanding, so expert evidence as to opinion and practice is potentially admissible to assist the court to reach an informed determination. In my view, the factual matrix of the present case, which is a far cry from that in *Tong Ho Wing*, falls into the latter category.
17. The Defendant’s solicitors next argue that the liability issue does not turn on any defect in the structure of the Machine that may potentially require expert evidence. But as pointed out above, there is a question as to whether there should be guards over the in-running nip hazards. The Defendant’s solicitors submit that even the Courtney Report says the in-running nips were normally inaccessible (paragraph 7.12), but I note even Mr Wong acknowledges that there were times when maintenance technicians had to crawl inside the Machine for inspection. The Defendant’s solicitors try to brush this aside by arguing that any danger posed by the in-running nips was unforeseeable since the workers had been instructed to switch off the Machine when carrying out repair or maintenance, and that the Accident was caused by the Deceased’s breach of such instructions. Such assumed facts have yet to be proved at the trial, but they raise a question as to whether, apart from such instructions, there should be other safety measures if it was contemplated that maintenance technicians sometimes had to crawl inside the Machine.
18. The Defendant’s solicitors further argue that whether there was a safe system of work is the ultimate issue to be decided by the court and therefore not a subject on which Mr Courtney can give expert opinion.
19. Whether there was a safe system of work does not turn on a single factual dispute as to whether the Machine was switched on or off at the time when the Deceased crawled inside the Machine. As discussed above, such issue encompasses various matters and dealing with those matters is not answering the ultimate issue. Although expert opinion is never allowed to be adduced on the extent of the legal duty (see paragraph 41 above), expert opinion may be given on whether or not the test is satisfied if it is an area which admits expert evidence. This must surely relate to an “issue in the proceedings in question”. As explained above, in cases where the court has its own experience to rely on or where it is a common sense matter, the expert cannot help (see *Cheng Shui Chu v South Horizons Management Limited* DCPI1305/2005, Deputy District Judge E Yip (unreported, 13th July 2007)). But if the issue before the court relates to some accepted standard of care, or some conduct by common practice or usage in a special field, or some explanation of complicated machinery or practice or safety procedure, expert evidence on these matters can be received.
20. The Defendant’s solicitors also submit that the liability issue does not turn on the absence of any stop button near to the position of the Deceased. As explained in paragraph 33 above, Mr Courtney opines that the structure of the Machine with the absence of a stop button near to the vicinity of the Deceased lends probability to the Plaintiffs’ account that there was a person close to the Deceased to relay instructions between the Deceased and the switch operator. It is in my view a matter on which the expert can properly make observations and it does not usurp the fact-finding role of the trial judge.
21. The Defendant’s solicitors place strong emphasis on the case of *Poon Kwok Wing Ernest v Airport Authority* HCPI305/20004, Suffiad J (unreported, 30th June 2006) upheld on appeal in CACV257/2006 (unreported, 28th February 2007). There the plaintiff fell from the escalator whilst travelling on it. He claimed the escalator stopped suddenly causing him to lose his balance and fall. Nobody claimed to have seen the accident. The plaintiff was unclear how the accident happened and thought there was nobody else on the escalator. The maintenance company found the escalator and safety switches to be in good condition during an overhaul a week before the accident and also immediately after the accident. The escalator was also restarted without activating the reset button. The relevant government department found no defects.
22. The plaintiff wished to adduce expert evidence from a lift and escalator engineer relating to the sudden stoppage. But there was no particularised complaint of any alleged defect in the construction or design of the escalator and no request for inspection of the escalator for 6 years since the accident. The sole issue was the cause of the sudden stoppage of the escalator, which was a factual matter for the trial judge for which no special expertise was required. Hence expert reconstruction of what happened at the time of the accident was denied.
23. Again, the factual matrix and the allegations of negligence in the present case are quite different from those in *Poon Kwok Wing Ernest*. Here a complicated Machine was involved and questions have been raised as to the system of work, the guarding of the in-running nips and the safety measures. I am unable to draw assistance from the case-specific conclusion in *Poon Kwok Wing Ernest*.
24. I am therefore persuaded that in the particular circumstances of this case, industrial and manufacturing engineering expert evidence on liability in relation to the structure, features, capabilities, safety measures, operation and maintenance of the Machine is necessary, relevant and of probative value in order to do justice. This does not usurp the function of the trial judge who remains the proper party for making findings of fact and drawing inferences from such primary findings. For the avoidance of doubt, the above conclusion is confined to the particular circumstances of the present case.

*VIII. Further discovery*

1. The written submissions of the parties’ respective solicitors referred to the matter of further discovery. It appears that the Plaintiffs intend to seek specific discovery of statements from other witnesses taken by Toplis and to require the Defendant to depose on affidavit whether it had at any time possession custody or power of the documents it now claims it does not presently possess. On the other hand, the Defendant appears to deny the existence of further statements taken by Toplis from other witnesses and to insist on maintaining privilege over its loss-adjuster’s investigation report and its correspondence with its insurer and loss adjuster in relation to the investigation of the Accident.
2. Since the Plaintiffs’ solicitors intimated they would make separate formal application to the court for further discovery if the matter cannot be amicably resolved, I will not deal with these matters in this Decision.

IX. Conclusion

1. In light of the aforesaid conclusions, I make the following orders :
2. leave to adduce expert evidence on liability limited to industrial and manufacturing systems engineering at the trial;
3. subject to paragraph 76 below, leave for the Plaintiffs to serve the expurgated Courtney Report within 7 days;
4. parties do within 7 days agree on a common bundle of documents to be submitted to their respective experts on liability;
5. leave for the parties to exchange supplemental expert report on liability from Mr Courtney for the Plaintiffs and expert report on liability by Mr C M Law of Loss Control Engineering Limited for the Defendant within 42 days from the date hereof.
6. Having read the Courtney Report, I direct that paragraphs 3.15, 3.16 and 4.30 be expunged. Experts must bear in mind their role under the *Ikarian Reefer* requirements. It is not for them to give opinion evidence on witness’ credibility. I also expunge the 2nd sentence in paragraph 4.34, the 2nd sentence of paragraph 7.10 and the 1st sentence in paragraph 4.39 of the Courtney Report. There is no complaint in the Plaintiffs’ pleadings that any delay in turning off the Machine caused by the absence of a stop button next to the position of the Deceased resulted in increased severity of his injuries. There is also no pleaded complaint that the Defendant failed to provide the Deceased with proper work clothes.
7. In light of the outstanding expert evidence on liability and further discovery, the present case is far from ready for trial. It is premature to consider directions for filing and service of any Revised Statement of Damages and Answer thereto. In the circumstances, I direct that the present proceedings be adjourned for a Check List Review hearing before the PI Master in chambers (open to the public) to be restored by the parties’ joint paper application to the PI Master within 21 days.
8. The Plaintiffs’ solicitors fairly submit that since the dispute between the parties on expert evidence as to liability is a case management matter, the appropriate costs order should be costs in the cause. I agree and grant a costs order *nisi* that the costs of the hearing on 12th April 1997 and on the argument on adducing expert evidence as to liability before me (including the preparation of the aforesaid written submissions) be costs in the cause.

# (Marlene Ng)

District Court Judge

Representation:

Messrs Liu, Chan & Lam for the Plaintiff.

Messrs Deacons for the Defendant.