#### DCPI1839/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1839 OF 2006

------------------------

|  |  |  |
| --- | --- | --- |
| BETWEEN | WONG CHOK WAI (王作惠) | Plaintiff |
|  | and |  |
|  | SUN CHUNG LUEN CHINESE PRODUCTS COMPANY LIMITED | Defendant |

------------------------

##### Coram: H H District Judge Marlene Ng in Chambers (Open to the Public)

Date of Hearing: 29th March, 2007

Date of Decision: 29th March, 2007

Date of Handing Down Reasons for Decision: 3rd April, 2007

------------------------

REASONS FOR DECISION

------------------------

###### I. Introduction

1. On 15th February 2007, Master C P Pang fixed a Pre-Trial Review in the present proceedings to be heard before the Personal Injuries Judge on 29th March 2007 for directions on expert evidence on liability. The learned Master further directed that two days before the Pre-Trial Review the parties do lodge written skeleton submissions stating (a) the issues of the case, (b) the disagreements between the parties’ respective orthopaedic experts, and (c) the reasons for adducing expert evidence on liability and for requiring the orthopaedic experts to give evidence at the trial.
2. At the Pre-Trial Review, I had no hesitation in agreeing with both Mr Tse, solicitor for the Plaintiff, and Ms Tsang, solicitor for the Defendant, that the orthopaedic experts ought to give evidence at the trial. As seen below, there were fundamental differences in the expert medical opinion of the orthopaedic experts on *inter alia* the causation of the Plaintiff’s injuries/disabilities, which was the central dispute between the parties.
3. I also made the following orders at the Pre-Trial Review :
4. the Defendant do within 30 days serve a bundle of medical literature referred to by its orthopaedic expert Dr Chun Siu Yeung (“Dr Chun”) with the passages therein relied by Dr Chun marked up for reference (“Medical Literature Bundle”);
5. the Plaintiff do within 30 days thereafter serve the Medical Literature Bundle with passages therein relied by Dr Johnson Lam (“Dr Lam”) (if any) marked up for reference;
6. the Medical Literature Bundle marked up as aforesaid and fully paginated/indexed shall be lodged with the court together with the trial bundle but separate therefrom;
7. leave to the Plaintiff to serve his supplemental witness statement limited to the issue of the scope of his employment duties with the Defendant within 21 days;
8. the Plaintiff do file and serve Revised Statement of Damages within 21 days;
9. the Defendant do file and serve Answer to the Revised Statement of Damages within 21 days thereafter;
10. the trial be fixed to be heard before a District Judge in Court at Court No.7 at 9:30am on 23rd July 2007 with 24th, 25th and 26th July 2007 reserved (the estimated length of trial is 4 days);
11. costs of the Pre-Trial Review hearing be costs in the cause; and
12. the Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.
13. The Plaintiff sought leave to adduce expert evidence on liability from an ergonomics expert. The Defendant opposed such application. At the Pre-Trial Review hearing, I declined to grant leave to the Plaintiff to adduce such expert evidence and reserved my reasons to be handed down, which I now do.

*II. Background facts*

1. There is no dispute that (a) for over 3 years the Plaintiff was employed as a salesman at the Defendant’s shop that sold *inter alia* preserved ham, Chinese preserved meat/sausages and beverages, and (b) the Plaintiff’s work included selling food/beverages, chopping sections of ham from preserved pig thighs (“Pig Thighs”) and then chopping the sections into small pieces, and weighing/packing Chinese preserved meat.
2. It was said that the Pig Thighs were heavy (with the Defendant accepting that each weighed on average 5-6 catties) and the meat texture and bones were hard. The parties also agreed that the bones would have to be chopped as well, but the Defendant claimed that the bones would be left untouched if a customer wanted a section he/she purchased to be cut up into smaller pieces.

*III. Plaintiff’s case*

1. According to the Plaintiff, it took about 5-10 minutes to chop up one Pig Thigh and on average about 10 odd to 20 Pig Thighs were sold during the peak winter season. The chopper provided by the Defendant for chopping Pig Thighs weighed about 2-3 catties. The Plaintiff had to manipulate the chopper to chop up the Pig Thighs into sections. The chopping action was repetitive, frequent and forceful. When the chopper became blunt (as it regularly did), the Defendant ignored the Plaintiff’s requests to whet the blade, so the Plaintiff had to chop the Pig Thighs more forcefully.
2. The Plaintiff claimed that he suffered right shoulder and upper limb discomfort/pain since early 2003 and the symptoms were aggravated by his continued chopping duties at work. The Plaintiff sought medical treatment and requested the Defendant to buy a meat-chopping machine for his work, but the Defendant declined to do so since it was not economical.
3. The Plaintiff claimed that his persistent right shoulder, upper limb and neck pain as well as the symptomatic presentation of the degeneration of his cervical spine were due to his work-related activities over the period of his employment with the Defendant. It was not the Plaintiff’s case that his injuries and disabilities were the result of any particular incident or trauma.

*IV. Defendant’s case*

1. The Defendant explained that the peak season for the sale of Chinese preserved meat was only a few months in winter and during that time 2 other salesmen worked together with the Plaintiff. The busiest days (尾牙) would last for about 20 days during which about 10 odd to 20 Pig Thighs would be sold a day. 2-3 Pig Thighs would be chopped up (each into 4-5 sections) for sale, and when they were sold another batch of 2-3 Pig Thighs would be chopped up. The 3 salesmen would take turns to do the chopping. During the Moon Festival or in the few days running up to 尾牙, only 5-6 Pig Thighs would be sold a day. During other periods, the sale of Chinese preserved ham would be minimal. During the non-peak season, the Plaintiff’s main task was to sell beverages and he would only have to chop Pig Thighs upon request by customers (and not in advance).
2. The Defendant claimed that the chopping activity was not repetitive and that it not the Plaintiff’s principal duty. As regards the chopper, the Defendant provided 4 choppers for use by the salesmen who were taught how to chop/cut the preserved ham. The salesmen were instructed to inform the supervisor (who also inspected the choppers) when the choppers became blunt for the Defendant to arrange professional whetting by independent contractors whilst the salesmen used the other choppers.

###### V. Factual evidence

1. The Plaintiff filed a witness statement describing *inter alia* his work activities that were briefly outlined above and also his injuries, medical treatment and disabilities.
2. The Defendant filed witness statements from both the supervisor and salesman of the relevant department for selling Chinese preserved meat. They also described the work activities of the salesmen associated with selling, chopping and cutting Pig Thighs and other Chinese preserved meat.

###### VI. Expert medical evidence

1. The parties were granted leave to adduce expert orthopaedic evidence. Both Dr Lam and Dr Chun provided separate reports as well as a joint supplementary report. They gave medical opinion on the disabilities of the Plaintiff, and commented on the causation of such disabilities.
2. Dr Lam’s diagnosis was (a) symptomatic cervical spondylosis and (b) overuse of right shoulder muscles with residual shoulder pain. Whilst Dr Lam accepted that diagnosis (a) was degenerative in nature, he noted it was previously asymptomatic. Dr Lam took the view that the temporal sequential relationship between the Plaintiff’s chopping activities at work and the presentation of the symptoms suggested that the latter was triggered by the former. In respect of diagnosis (b), Dr Lam opined that there was causal relationship between the Plaintiff’s chopping activities at work and the right shoulder pain.
3. On the other hand, Dr Chun was of the view the Plaintiff’s medical condition suggested features of degeneration that would have taken a long time to develop and could not have been caused by his employment duties with the Defendant. With the onset of degenerative changes, symptomatic presentation of neck/back pain could happen at any time with or without trauma/injury, and it was likely that there would be more episodes of discomfort/pain when an individual got older.
4. Dr Chun queried the unusual presentation of diffuse back pain as well as continuous soreness/pain at neck and back alleged by the Plaintiff. Dr Chun noted that medical record of the Plaintiff’s report of right neck symptoms and right forearm pain first appeared after he was laid off. Dr Chun pointed out that the observed decreased subacromial space was a congenital condition that predisposed development of impingement syndrome, and he was of the view that the Plaintiff’s pre-injury sports activities rather than his work activities were more likely to cause such impingement syndrome. Dr Chun did not consider the chopping activities as described (which he considered neither repetitive nor frequent) created any occupational hazard. He noted that the first report of shoulder soreness suffered by the Plaintiff was on 21st May 2003, which was not a busy season for selling Pig Thighs.

###### VII. Ergonomics expert

1. Mr Tse submitted that ergonomics was concerned with the design of “man-machine-systems” with the aim of designing work systems that were safe, healthy and efficient. He argued that the Plaintiff should be allowed to adduce expert evidence on the safe limits for using a chopper to cut hard objects (ie Chinese preserved ham) from time to time at work in order to assist the court in determining whether or not the Defendant’s work practice of providing a chopper to the Plaintiff to cut Chinese preserved ham would exceed such safe limits and thereby cause injury to the Plaintiff. Mr Tse argued that the ergonomics expert would be helpful as he/she would prepare a comprehensive analysis of the work process and give opinion on whether and if so how the Plaintiff injuries were caused by his work activities.
2. The modern trend of personal injuries litigation, as observed by Master Kwan in *Cheung Yuen Fan Sally v Hong Kong University of Science & Technology* HCPI106&107/2003 (unreported, 13th March 2006), is that expert reports on liability are not normally allowed. In *Cheung Yuen Fan Sally*’s case, Master Kwan referred to the judgment of Suffiad J in *Tong Ho Wing v Wong Fuk* HCPI1369/1999 (unreported, 19th July 2000) to say that 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.
3. I am, however, prepared to look at the matter not on the basis of general rule and/or exception thereto, but on whether expert ergonomics evidence satisfies the criteria of necessity, relevance and probative value to justify adducing the same at trial (*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)).
4. Here the work activity involved was chopping Chinese preserved ham and Pig Thighs. Whilst I cannot say that this is an everyday activity, it is plain that such work involved little complexity or technical understanding. In my view, it is a task which a trial judge will readily understand and which he can readily assess on the evidence that will be placed before him/her. As Seagroatt J commented in *Wong Hin Pui v Mok Ying Kit & anor* [2000] 1 HKLRD 856, 874, legal practitioners should impute to the judge a degree of general knowledge, practical common sense, “an understanding of life, of disability and of what it is necessary to compensate in principle”.
5. In a nutshell, it was suggested that the ergonomics expert was to tell the court the physical demands made on an individual by the repeated act of chopping hard meat and bones over an extended period. But here the trial judge will be facilitated by the Plaintiff’s own factual evidence as to the scope of his employment duties, his work practice, the frequency and repetitive nature of the chopping duties, the weight of Pig Thighs and chopper, and the impact of the bluntness of the choppers on his work. Further, the Defendant will also call 2 factual witnesses (ie the supervisor and co-salesman) to describe the Defendant’s stance on these matters. Such factual evidence by the parties’ respective factual witnesses will be tested by cross-examination to assist the court in weighing their evidence.
6. The trial judge will be further assisted by medical expert evidence. Orthopaedic specialists are experts in human musculoskeletal structure and are in a position to assist the court on how certain physical activities will impact on an individual’s musculoskeletal structure and (where appropriate) cause injuries/impairment. Indeed, this is the area on which Dr Lam and Dr Chun gave their opinion in their joint supplemental expert report.
7. Dr Chun explained in paragraphs 25-26 of the joint supplemental report why the chopping action would not support the Plaintiff’s claim that his injuries and disabilities were work-related :

“25. Secondly, if one observed the chopping action, one sees that the right shoulder (for right hand dominant person) moves not as much as the elbow and the main action is at the elbow and forearm. The hand holds tightly the chopper with extension at the wrist joint, the forearm at neutral position (not supinated or pronated). The forearm is fully flexed at the elbow and the shoulder may be flexed to less than 90 degrees, but usually at the range of 60-90 degrees, (and very seldom overhead position) at chopping. If the chopping caused overuse, the effect of overuse should target first at the forearm, at elbow level and at the wrist level—resulting pain around the elbow, forearm and wrist and not the shoulder first! Please note the first record the right forearm pain appeared on 19/8/2005, after cessation of his work and not before.

* 1. Thirdly, our muscles, tendons, are biological organs and tissues that are constantly turning over and certainly one only works one third of the time in a day and at least one third of time he is resting the biological muscles. ……”

1. On the other hand, Dr Lam said in paragraphs 37-38 of the joint supplemental report as follows :

“37. However, Mr. Wong was asymptomatic before working such heavy and strenuous duties. On the issue of causation of the right shoulder pain, there was no history of Mr. Wong having pre-existing pain in the right upper limb before working in this job that required a lot of chopping. Since chopping did require rather heavy exertion for the right upper limb and shoulder, and considering the temporal sequence, it was likely that the strenuous physical demand of this job caused the pain, impairment and disability in the right upper limb. In Mr. Wong’s case, the causal relation of the right shoulder pain and the job of chopping was also reflected in the history – after changing to use new knives, there was a period of improvement, but when the knives were blunted with use, the situation got worse again. Mr. Wong was not involved in other activities that would trigger pain in the right shoulder that I know of. It was probable that the strenuous duties involving the right shoulder was a major cause and trigger in Mr. Wong’s right shoulder pain. Had it not been for such excessive and strenuous activities, it was probable that Mr. Wong would remain symptomatic.

38. Mr. Wong had radiological evidence of narrowing of subacrominal space, and presence of impingement syndrome in the bundle of clinical notes. In impingement syndrome, in simple terms, during flexion and abduction of the shoulder (elevation of the shoulder), the greater tuberosity and its overlying supraspinatus tendon impinge on the coracoacrominal ligament/coracoacrominal arch. In Mr. Wong’s case, he was a Chinese Ham butcher. As far as I know, Chinese Ham were very hard, and he probably needed considerable force in chopping it, and large movement of the shoulder with elevation of shoulder (flexion/abduction) before chopping down was likely to be required. This probably accounted for causation/triggering of symptoms in Mr Wong’s case …… At the time of my previous assessment, Mr. Wong still suffered from residual pain, mild stiffness, and mild shoulder weakness with slightly decreased power of abduction and flexion.”

1. Given that the orthopaedic experts have already addressed the issue of how the chopping activities would impact on the Plaintiff’s musculoskeletal structure and given the lay evidence from the factual witnesses referred to above, to allow ergonomics expert evidence to be adduced in this case will only cause duplication and add cost overlay. Looking at the matter in the round, I am driven to the view that there is really no need for ergonomics expert evidence. Therefore at the Pre-Trial Review hearing, I have declined to grant leave to adduce such evidence.
2. In conclusion, it is useful to repeat the trenchant reminder of Seagroatt J in *Wong Hin Pui*’s case (supra at pp.874-875), which I respectfully agree :

“ It is incumbent upon all counsel, both senior and junior, to exercise detached and practical judgment when it comes to deciding what areas of damage, care and provision actually *need* expert evidence and to be satisfied that what they seek is *actually* expert evidence. An indiscriminate obtaining of reports, provides for any judge, an enormous amount of reading before he is able to decide to what extent the contents of reports are relevant and essential. He or she ought to be able to rely on counsel exercising a degree of judgment which reduces the material to that which is necessary, and counsel should impute to the judge, whoever he or she may be, a degree of understanding of life, of disability and of what it is necessary to compensate in principle.

…… The time is now ripe for the court to exercise a controlling hand far earlier than I thought was necessary if practitioners are not prepared to look hard and fast at the case of the person they represent and ask themselves – “What do we *really* need in the way of expert evidence, and what can we ask the Defendants to *agree* at an *early* stage?””

# (Marlene Ng)

District Court Judge

Representation:

Mr C Tse of Messrs Yip, Tse & Tang for the Plaintiff

Ms C Tsang of Messrs Susan Liang & Co for the Defendant.