###### DCPI 164/2004

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES ACTION NO. 164 OF 2004**

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##### BETWEEN

## KWAN Chu-kwong & CHOW Fuk-wah

## as administrators of the estate of

## CHOW Pang-kui Plaintiffs

### and

#### CHENG Shui-hung Defendant

and

YIN Tse-ping 3rd Party

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Coram: Deputy Judge W. Lam in Court

Dates of Hearing : 1st – 4th August 2005

Date of Handing Down Judgment : 11th August 2005

Judgment

# Background

* 1. On 23rd May 2001 at about 12:15 hours, an air-conditioning installation worker Mr CHOW (hereinafter called “DP”) was hoisting one of the air-conditioning machines by using his self-welded metal bracket to support a chain-and-block pulley system, but the bracket broke, causing the heavy machine and pulley assembly to fall onto DP’s head and/or the wooden ladder on which DP was standing about 2 metres above the pavement. DP fell onto the pavement, sustaining head injuries and died. At the time, the relevant shop was under renovation by tenant Sino Weal Ltd of which defendant Mr CHENG (“CHENG”) was a director and who turning the shop into a café. Cheng had contracted his renovation work to 3rd Party Mr YIN (“YIN”), but YIN was only involved in “wet” and wood work. YIN knew nothing about air-conditioning, and so by CHENG’s request he (YIN) introduced old friend DP to CHENG to do the latter work. DP was a licensed electrical worker and had his own business called “Hoi Wan Electricals (開雲電器)”. As a result of DP’s death, the Plaintiffs now sue CHENG under Negligence, Occupiers liability, under FAO Cap.22 and LARCO Cap.23, and for Breach of statutory duty under the Construction Site Safety Regulations Cap.59I R.38A. CHENG issued a 3rd Party Notice to YIN for possible contribution should the Plaintiffs’ claim succeed.

## The issues

1. The issues in this proceeding may be listed under the Plaintiffs’ “Heads of claim” and whether there was any contributory negligence:
   * 1. Did CHENG (or YIN) owe a common law duty of care to DP?
     2. Was CHENG as tenant liable to DP on the basis of occupiers liability?
     3. Did CHENG (or YIN) owe a duty of care to DP out of an employer-employee relationship?
     4. Did CHENG (or YIN) breach the statutory duty under Cap.59I R.38A?
     5. If DP’s claim is proved, how much, if any, contributory negligence would DP himself be responsible for?

## The evidence

1. DP’s younger sister Mdm CHOW (PW1) adopted her witness statement in Bundle “A” (Pleadings and witness statements bundle) at pages 64 to 72. She was also referred to DP’s bank accounts e.g. Bundle “B” (Evidence bundle) at pages 128ff, 153 etc, about which PW1 had some knowledge. She stated that DP “was employed as a casual airconditioning worker at a daily wage of $1000 because I handled his accounts, and any lack of documents means he was working in the capacity of a casual employee”, and more importantly she has heard that Deft CHENG had “agreed to pay $2500 for 2.5 days of DP’s work”. I will analyse PW1’s evidence later.
2. PW2 was Labour Department investigating officer Mr LAU. He adopted his report on the accident as his evidence, which was not in dispute. It is clear that the relevant steel bracket, which collapsed, had been constructed by DP himself. PW2 explained that the problems regarding the bracket were two: (1) a diagonal supporting strut was necessary but absent, leaving the horizontal limb to support such a heavy machine on its own, and (2) the welding was inadequate, having been done only in spots instead of being continuous. In other words, as far as the hoisting mechanism was concerned, neither CHENG nor YIN was involved. If there is any relevance, PW2’s evidence shows that the cause of the accident was from a structure *external to*, and *not inherent in*, CHENG’s premises. PW2 also testified that nobody had been prosecuted as a result of this accident because there was no “duty holder”: I will address this aspect under “Findings and Conclusion” below.
3. CHENG testified, adopting his witness statement in Bundle pages 74 to 83. His co-director in Sino Weal Mr YU also testified. YU’s testimony was consistent with CHENG’s, although in the main they spoke on different matters. In essence, CHENG’s testimony was that he said he contracted with YIN for renovation work, but YIN was only doing the abovestated woodwork and “wet work” such as plastering etc, and knew nothing about air-conditioning. YIN therefore introduced his old friend DP to help CHENG which was on or about the 17th May 2001. A few days later YIN quoted to CHENG $3500 (including airflow meters) for each of the three airconditioners, to which CHENG agreed. While this may go some way to show an existence of a subcontract from YIN to DP, I have seen no document to support this concept. The fact that YIN stated a price to CHENG, and/or that YIN had asked DP to do work for CHENG, could equally point to DP being an independent contractor, with YIN only acting as a middleman. We have seen no documentary proof to show that YIN had subcontracted any work to DP, not to mention YIN’s denial of the existence of such a relationship. On the contrary, we have seen documentary proof of a contract from CHENG to YIN, but *stopping at YIN*, because YIN’s invoices included no item regarding air-conditioning. In other words CHENG’s oral assertion is bare, because we have seen no proof that YIN had undertaken the airconditioning work *as a principal contractor*. In addition to this it is not disputed that YIN’s area of expertise involved only woodwork and “wet” work: see YIN’s 3 invoices at Bundle “B” pages 90, 91 and 97.
4. YIN testified, adopting his witness statement at Bundle pages 90 to 94. He said that on the 16th May 2001, he took DP to CHENG’s shop and introduced DP to CHENG. YIN saw the two men speak to each other, but he himself did not stay because he needed to attend to other matters. The essence of his testimony was that as far as the instant air-conditioning work was concerned, he had nothing to do with what went on between CHENG and DP. He said he was merely a middleman. His testimony was challenged by Counsel: I will analyse this aspect below.
5. It is not disputed that after the fatal incident, $2000 cash was paid to DP’s family, but this was because CHENG had agreed to go along with landlord CHAN’s idea to pay “tribute money” (帛金) to DP’s family, and to which CHENG’s co-director YU had also agreed. However it is obvious that this payment cannot prove that DP was employed by CHENG, because: (1) the sum was paid on the instigation of the landlord Mr CHAN, not defendant CHENG, (2) the sum was only in the nature of “tribute money” (帛金), not wages, and (3) the fact that the sum was $2000 points to payment other than wages, because if it had been wages the sum ought to have been $2500 even on PW1’s hearsay evidence. Put in another way, this payment cannot prove the existence of any contract of employment between DP and anybody, not to mention the further requirement as to whether, if employment had existed, it was with CHENG or with YIN.

## Findings and Conclusion

1. I now come to the 5 issues as stated earlier.

*Common law duty of care*

1. This would only arise if some nexus existed between CHENG and/or YIN with DP. If CHENG or YIN were mere “bystanders” they would owe no such duty. Accordingly this question must peg itself onto one of more of the questions discussed below, but does not exist on its own. As counsel for the plaintiffs correctly agreed, a claim under this heading overlaps that under the heading of Occupiers liability, to which I will now turn.

*Occupiers liability*

1. As to whether the Plaintiffs have sued the correct person, although the tenant was actually CHENG’s company “Sino Weal” which had rented from landlord Mr CHAN, it is clear that CHENG, being the proprietor of the intended café and in charge of renovation works, CHENG had sufficient control over the premises to make him at least one of the “occupiers”: see *Wheat v E.Lacon & Co Ltd* (supra) at page 577G. I find no mistake regarding the Deft being sued. Indeed the defence does not rely heavily on this argument.
2. In reliance on this head of claim the Plaintiffs cite *Rainfield Design & Associates Ltd v SIU Chi-moon* [2000] 2 HKLRD 226 (CFA), *TSANG Hing-cheung* HCPI 869/2001, and the Occupier’s Liability Ordinance Cap.314 s.4(b). However these do not, in my view, help the Plaintiffs because we are not dealing with a principal contractor responsible for the whole of a construction site, and DP in our case was not doing “extra-hazardous work” or “highway work” thereby posing a danger to the public. In fixing liability upon an occupier who has engaged an incompetent worker, the authorities say the occupier is liable to *other visitors* who suffer from the work of the incompetent workers, and *to the worker on site* if there is some foreseeable danger inherent to the site (more below). But the important point is, a person is only liable under the law on occupiers liability if there is something inherently dangerous in the premises. For example, I may be liable to my friend who visits me if I had engaged an unskilled electrician to install a light switch when I should have reasonably ascertained that the worker was qualified, my friend then touches the light switch and sustains electrical burns from an exposed wire, which would be an example of liability to an outsider. A second example is, if I am reasonably expected to know that my independent contractor would cause a wall to collapse on him if he is incompetent and he needs to cut a vertical beam in order to access the main electrical supply, yet I do not find out whether he is a competent and qualified tradesman. But the thing which causes him injury must still be inherent in my premises. I can see nothing in the authorities which says that if the workman creates his own devices, I am liable for his injuries because I have not ascertained that he is competent to make such devices. Neither the authorities nor Cap.314 s.4(b) says that I am liable to the incompetent workman because he injures himself as a result of his own lack of experience.
3. *HSU Li-Yun v Incorporated Owners of Yuen Fat Building* [2000] 2 HKC 365 goes just a small way to the Plaintiffs’ case, but still does not assist them, because the “system of work” in *HSU*’s case was partly the fault of the occupier, and more importantly the system of work in that case was dangerous as a result of an inherent situation inside the premises. In other words, in *HSU*’s case the defendant was entangled in the overall dangerous situation, which is not the situation in our case today. Further and in any event, CHENG’s case is that he was not in DP’s trade and so he would not know what system of work was safe or unsafe, in addition to the fact that he was not even on site at the time, and so he could not know what system of work there was, hence he could not possibly have warned anybody. But even if the occupier may know that a system of work may be unsafe, he is not liable to the independent workman *as an occupier*: see *Ferguson v Welsh* [1987] 1 WLR 1553, and *Tomlinson v Congleton Borough Council and Anor* [2004] 1 AC 46.
4. Actually the law on occupiers liability is well established and illustrated by *Wheat v E.Lacon & Co Ltd* [1966] AC 552 where the term “dangerous premises” was used. In our case today there was nothing *inherent* in CHENG’s property which was dangerous. The incident was not caused by a trap existing in CHENG’s premises. DP did not fall as a result of a wet spot on the floor, or fall into an inconspicuous hole when climbing onto the roof to wire up electricity, or sustain injuries as a result of part of the ceiling falling onto his head, for example. The “danger” here was the insecure bracket which was external to, and distinct from, the premises itself, even though at the time it was temporarily adhered by DP to the outside wall. The assembly was constructed solely by DP himself for the purpose of hoisting the air-conditioner, but this had nothing to do with CHENG’s status as an occupier. From the evidence I can find no basis for the Plaintiffs to base their claim on this heading.

*Employer-employee relationship (contractor’s responsibility)* : CHENG and/or YIN

1. I have considered the law on “employee” as against “independent contractor” as discussed in *Market Investigations v Minister of Society Security* [1969] 2 QB 173 especially at 184G-H, *LEE Ting-sang v CHUNG Chi-keung* [1990] HKLR 764, *CHENG Yuen v The Royal Hong Kong Golf Club* CACV 146/1996, and similar cases.
2. That CHENG was DP’s employer was the effect of PW1’s evidence. This was because she said (a) “a lack of accounts showing the purchase of materials pointed to DP being a casual employee”, i.e. DP was not an independent operator, and (b) CHENG had agreed to pay 2.5 days wages when “in the afternoon of the accident CHENG via telephone told DP’s sister Mdm KWAN and/or YIN, and YIN then told me that CHENG was willing to pay 2.5 days worth of wages i.e. $2500 to us”. However, to prove that CHENG was DP’s employer via PW1 is fraught with problems because:
   * 1. On the issue of keeping accounts PW1’s testimony was unreliable. Her records about DP’s business were not related to the material period of time. Even for pre-accident periods, PW1’s records were unreliable, as evidenced by her filling out DP’s tax returns for the year 1997-1998 which had omitted casual earnings, and she admitted that she knew DP had other income, but that this was not declared to the Inland Revenue Department “because DP had not provided me with details other than what I had filled in on his behalf”. The fact that DP had not purchased the air-conditioners does not prove that he was CHENG’s employee, because a contract to install something which a proprietor had bought himself, but which required an independent contractor to install, was in no way unusual. I can buy light fittings in my lounge then engage an independent electrician to install them, but that does not make the electrician my employee.
     2. As to the “admission by CHENG” in the afternoon of the accident, i.e. that CHENG was willing to pay DP’s family $2500, this was purely hearsay, and worse because it was double-hearsay because PW1 had heard it from YIN who had allegedly heard it from PW1’s sister-in-law Mdm KWAN, but CHENG had never spoken to PW1 directly, and indeed he had never surfaced even at the meeting convened by YIN in the evening after the accident. I have heard no evidence that CHENG had agreed to pay *wages* to DP at any time. It was YIN who was keen to obtain some money for DP’s family, but this was understandable because it was YIN who had introduced DP to such work, in addition to the fact that DP and YIN had been long time friends. Further and in any event, it cannot be YIN’s case that he knew CHENG had employed DP because on YIN’s own version he (YIN) knew nothing about what was happening between CHENG and DP because he (YIN) said he was “a mere middleman introducing DP to CHENG” and nothing more.
     3. Although PW1 stated that unless CHENG had made such an “admission”, she and family would not have gone to the café that evening. However the evidence is that the meeting was only organised by YIN, not at the suggestion of CHENG, not to mention the hearsay problem with PW1’s testimony in this regard.
     4. The $2000 paid to DP’s family was tribute money (帛金), not wages. I accept CHENG’s testimony in this regard when he said landlord Mr CHAN had made such a suggestion, and also because $2000 was obviously not the “2.5 days of wages” referred to by PW1.
     5. The fact that DP was conducting his own business under the style of “Hoi Wan Electricals (開雲電器)” supports the notion of DP being an independent and self-employed contractor.
     6. That DP had brought along equipment to work points to the fact that he was unlikely to have been an employee.
3. For the above reasons I find PW1 to be no help in proving that CHENG was employing DP. I cannot see any duty of care owed by CHENG to DP under this head of claim.
4. As to whether YIN was DP’s employer or principal contractor, it is not disputed that this is only an academic question because the Plaintiffs have not sued YIN. However I feel it my duty to address this issue because the evidence in this area is linked to the rest. In summary, CHENG’s testimony was to the effect that he had engaged YIN to undertake air-conditioning work, and YIN had engaged DP, so that YIN was the principal contractor for DP’s work. This was the essence in the difference between the evidence of CHENG and that of YIN. However on CHENG’s own case he was external to the relationship between YIN and DP and so, unless there was a confession by YIN which CHENG had heard, which there was not, CHENG cannot prove his case in this way. But there are other pieces of evidence going against CHENG’s allegations:
   * 1. If YIN had been a principal contractor in air-conditioning, YIN would have stated the cost of providing air-conditioning in his invoices, but such entries are absent. CHENG agreed that these 3 invoices were the only ones he had received from YIN: see Bundle “B” at pages 90, 91 and 97.
     2. There had never been any admission by YIN that he was DP’s employer or principal contractor.
     3. YIN took DP’s family to the CHENG’s other café that evening. If YIN had been responsible for paying DP’s wages, there would have been no need to make that trip. Not even CHENG has said YIN was DP’s employer, because all CHENG said was he had “left everything to YIN”, hence he would not know whether DP was YIN’s employee or was he an independent contractor.
     4. Further, if YIN (or indeed if CHENG) had been DP’s principal contractor, such a concept was not supported by the finding of the Labour Department: more in the next paragraph.
5. YIN denied any principal contractor and subcontractor relationship as between himself and DP. He was challenged because he said he had several electricians and/or airconditioning workmen he could call upon, and he had in the past subcontracted electrical work to them, albeit rarely. The implication of the challenge was that YIN could well have subcontracted the work to DP. However despite lengthy cross-examination YIN was not shaken, and even the evidence given in the Coroner’s Court a long time ago showed no inconsistency with his present evidence. In addition, I find support for YIN’s testimony to make it credible because:
   * 1. The reason why YIN had not subcontracted the instant airconditioning installation work to his other 2 or 3 workmen although they were “up his sleeve”, was that the work here was of small scale, being the installation of 2 machines which CHENG himself had already bought, together with the fact that the other workmen were living in Kowloon and Hong Kong Island, while DP was resident in CHENG’s area of Tuen Mun.
     2. YIN had invoiced every item of work, even including the dismantling of completed items but which required rebuilding, including “subcontracted out” items. This is evident in the three invoices we have seen above, and these three invoices were all which were in existence. In particular I note Bundle “B” page 167 Item No.1 which had initially been subcontracted out although in the end the work was not required by his then client, yet this item had been written into the invoice. And none of the invoices had mentioned air-conditioning. To say that all other items of work had been invoiced, but air-conditioning had been deliberately missed out, I find illogical.
     3. Cement worker Mr KWONG was not introduced to CHENG, because KWONG was a subcontractor for whose work YIN was responsible. By contrast, DP was introduced to CHENG, and YIN explained that this was because DP was not a subcontractor but an independent contractor. The introduction was to faciliate direct negotiations between CHENG and DP. I find this explanation logical and convincing.
     4. More importantly, if air-conditioning had been an integral part of CHENG’s renovation work, after DP had died YIN would have simply subcontracted the required, and contracted, air-conditioning work to some other workman or firm, or would have deleted part of his charges to CHENG. Yet it is not disputed that YIN had not engaged anybody after DP died. I find this a powerful indicator that YIN had nothing to do with DP’s work *vis-à-vis* CHENG.
     5. YIN explained why he would not hesitate to subcontract out “wet” work, but rarely if ever subcontract out electrical work because he had no knowledge in this area, that licences were required, that risk to life was high, and there was little profit to make “because the proprietors usually knew the cost themselves and you cannot put a large premium by taking over such work”. In fact this part of YIN’s evidence was indeed supported by CHENG’s own evidence when CHENG himself said “I was previously quoted by two contractors at $5000 for each machine, and I found them expensive. That was why I agreed on $3500”, i.e. a proprietor here indeed knew his prices as YIN explained.
     6. As to why YIN did not subcontract out electrical work (including air-conditioning work) for CHENG, YIN said this was because there were already electrical contractors on site, and it was “against the rules of trade” for him to compete. Defence challenged YIN in this regard, saying it would also have been against the rules if *CHENG* had contracted other electricians. However I do not find this to erode into YIN’s credibility, because *CHENG* was not a trademan, whereas *YIN* was. I can understand that one proprietor could engage more than one trademen working in the same trade to do different aspects of similar work, but for a “colleague” (contractor) to engage a workman to compete with his colleague would be distasteful and hence “against the rules”.
6. I find YIN to be a credible witness and I accept his evidence to represent the truth. I find that DP was neither employed nor subcontracted by YIN (or CHENG). I find that DP was an independent contractor who was engaged by CHENG through YIN’s introduction at CHENG’s request.

*Breach of statutory duty in the Construction Site Safety Regulations Cap.59I R.38A*

1. As a corollary to the above, because neither CHENG nor YIN was DP’s employer or principal contractor, the argument under breach of statutory duty does not apply. In other words neither CHENG nor YIN had breached R.38A or any other statute. A claim under this heading is further weakened by Labour Department investigator PW2 who had gone to the scene immediately after the accident, who had obtained copies of all relevant documents without any delay, and who had consulted the Department of Justice regarding possible prosecutions under the Regulations, but neither PW2 nor the Department of Justice could point to any “duty holder” i.e. the authorities did not find either CHENG or YIN to have been the “principal contractor for the site”. Put another way, the authorities did not find CHENG or YIN to have been the contractor responsible for DP’s death, otherwise one or the other or both would have been prosecuted. A claim under this heading must also fail.

*Quantum & Contributory negligence*

1. Even if liability had been established, quantum has not been satisfactory proved because the only source of calculation was from PW1, but her knowledge about DP’s finances was unsatisfactory and unreliable, consisting of hearsay, and did not wholly and directly point to the pre-incident period. However this becomes unimportant in light of my finding that there is no liability.
2. Because of the lack of liability, the final question of contributory negligence need not strictly be answered. However as the parties have discussed this area, I should address this issue for the sake of completeness. As is supported by the Labour Department’s findings which is not disputed, because the bracket and hoist assembly were constructed by DP and by him alone, the whole “system of work” having been designed and put into action only by DP, even if there was any duty of care owed by CHENG or YIN to DP, the finding of contributory negligence must be 100%, and the claim is therefore worth zero to the Plaintiffs.
3. I am sympathetic to DP’s family members over this unfortunate incident, but I must make my findings on the basis of Law. I am unable to make a finding that CHENG (or YIN) was DP’s employer, or that YIN was DP’s principal contractor, or that CHENG (or YIN) had breached any statutory duty. I can see no duty of care owed to DP by CHENG (or YIN) under common law or under the Occupiers Liability Ordinance. None of the Plaintiffs’ heads of claim I find able to sustain this action.

## Costs

1. I find that the Plaintiffs have failed to prove their case against the Defendant, and the Defendant has failed to prove his case against the 3rd Party even though the Defendant could have successfully and completely defended the Plaintiffs’ action on his own. Accordingly I have no option but to award costs *nisi* in the following way:
   * 1. As between the Plaintiffs and the Defendant, the Plaintiffs to pay the Defendant’s costs, to be taxed if not agreed, and
     2. As between the Defendant and the 3rd Party, the Defendant to pay the 3rd Party’s costs to be taxed according to the Legal Aid Regulations.

W. Lam

Deputy DistrictJudge

Representation :

Mr. Louie MUI instructed by Messrs. Lam, Lee & Lai for Plaintiffs

Ms. Teresa WU instructed by Messrs. Paul W. Tse for Defendant

Ms. Susanna LEONG instructed by Messrs. To, Lam & Co. for Third Party