###### DCPI 231/2007

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 231 OF 2007

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##### BETWEEN

## SULAKHAN SINGH Plaintiff

### and

#### FEDERAL SECURITIES LIMITED 1st Defendant

JETLINE COMPANY LIMITED 2nd Defendant

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Coram: Her Honour Judge H.C. Wong in Court

Dates of Hearing : 28-29 February 2008, 3-5, 7, 13, 26 March 2008

Date of Handing Down Judgment : 6 June 2008

JUDGMENT

1. The Plaintiff, Mr. Singh, was employed by the 1st Defendant to work as a security guard. On 16 March 2006, he was assigned by the 1st Defendant to a construction site situated at the Club House, Level 3, Tiu Keng Leng Station Development at TKOTL No. 73, Area 73B, Tseng Kwan O, New Territories, Site A (“the construction site”). The Plaintiff claims he was patrolling the site at around 10:30 p.m. when he stepped on a piece of metal pipe on the floor and fell forward onto to the ground sustaining serious injuries to his person.
2. The 1st Defendant is a firm providing security services to contractors at construction sites.
3. The 2nd Defendant is a fitting-out contractor of the Club House (“the construction site”).

Undisputed Facts

1. On the evening of 16 March 2006, Mr. Singh was employed to work as the night shift guard from 7:00 p.m. to 7:00 a.m. at the construction site. He possessed a valid security personnel permit at the time of the accident which allowed him to carry out two categories of security work (“green card”). It allowed him to perform guarding work restricted to a ‘single private residential building’ which does not require the carrying of arms and ammunitions for the period 25 October 2005 and 24 October 2010 (category A) and to perform guarding work ‘in respect of any persons or properties the performance of which does not require the carrying of arms and ammunitions not falling within category A’ between 25 October 2005 and 4 May 2007.
2. After his fall, Mr. Singh called the ambulance which took him to the Accident and Emergency Department (“A & E”) of the Tseung Kwan O Hospital at 22:30 hrs on 16 March 2006. He told the A & E doctor on duty that he had a slip and fall accident while on duty that evening. He claimed he had discomfort over his right eye with foreign body sensation after the accident and he could not see from his right eye soon after the accident. He further complained of pain over his right elbow, lower back, and abrasion over his right knee. The doctor found him to be alert with no facial or scalp injuries; his right pupil was sluggish to light and the red reflex of the right pupil had been replaced by a grey/greenish hue. The doctor also found foreign bodies suspected to be sand at the inferior conjunctiva of the right eye. The visual acuity of his right eye was poor with light perception only. The doctor confirmed he had abrasions over his right knee and right elbow. The doctor’s provisional diagnosis was “right eye visual loss (suspected retinal detachment), right elbow abrasion, right knee injury, back sprain”. The initial X-ray taken showed he suffered no fracture at the spine, X-ray of his right knee showed degenerative changes. Subsequent X-ray report on 20 March 2006 suggested possible avulsion fracture of the lateral aspect of the right lateral tibial condyle.
3. He was kept overnight at the A & E Department waiting for assessment by the Ophthalmology Department of the hospital in the next morning. He was discharged at 11:20 hrs on 18 March 2006.

Disputed Facts

1. Mr. Singh claimed his duty required him to patrol the construction site every 2 hours. On the night of 16 March 2006, he was doing his third patrol round at the construction site when he noticed some of the light bulbs had gone off under the staircase adjacent to the site office. Due to dim lighting of the area, he claimed he slipped on a piece of loose metal piping on the floor and fell. He further claimed he was not provided with adequate equipment or appliances, namely, helmet and torch to enable him to carry out his work safely. He further claimed that the Defendants had failed to remove construction debris and rubbish on the floor of the construction site and failed to operate a safe place or safe system of work.
2. The 1st Defendant (“Federal”) alleged that Mr. Singh was provided with a torch and a safety helmet, that he was further instructed to wear the safety helmet while on duty and to use the torch whenever necessary while on duty. He was also instructed to report immediately to his supervisor of any unsafe condition at the construction site. It claimed that the lighting of the construction site was adequate and that Mr. Singh had failed to disclose to Federal his longstanding right eye retinal detachment and his cataract operation prior to the accident. Further, since Mr. Singh admitted he had noticed the alleged piece of metal piping on the floor under the staircase at earlier patrol rounds of the construction site, he should have removed the object to ensure his own safety or avoid it on his next patrol round.
3. The 2nd Defendant (“Jetline”) claimed that there were torches available at the site office which Mr. Singh could have used if he was not provided with a torch by the 1st Defendant. He was further instructed by Jetline’s Mr. Yu to use the torch whenever necessary or when the situation required it. Further, Mr. Singh should have reported the dim lighting immediately and to take reasonable precaution for his own safety by avoiding to step on the alleged piece of piping on the floor.
4. Both Federal and Jetline denied the accident had taken place in the course of employment. Both pleaded contributory negligence by Mr. Singh in failing to avoid the accident.

Issues on Liability

1. (1) Did the accident happen in the course of employment?

(2) If the answer to (1) is yes, what was the cause of the accident?

(3) Was the accident due in whole or in part to Mr. Singh’s own negligence?

(1) Did the accident happen in the course of employment?

The Plaintiff’s case

1. On Mr. Singh’s first day of work (31 October 2005), he was assigned by Federal to work at Jetline’s construction site, namely, the Club House at Tiu Keng Leng MTR Station, Level 3. On that day, Mr. George Yu, the Assistant Project Manager of Jetline, told him what his duties were. He was shown the area he was supposed to patrol every 2 hours during the night shift. The patrol route involved coming out of the site office on the 3rd floor of the Club House, walking along a fenced area, round the swimming pool, and back towards the site office along and under the staircase (leading to level 4) before returning to the site office. He claimed he had followed these instructions and did the patrol rounds every night at 2 hour intervals. He knew the site well because he worked at the site between 31 October 2005 and 7 February 2006. He was posted back to the construction site on 14 March 2006.

The 1st Defendant’s case

1. Federal, on the other hand, denied Mr. Singh was required to make any patrol rounds at the construction site at all. Mr. Saif, managing director of Federal, claimed the contract between Federal and Jetline was to provide a sedentary security guard at the Club House at night. The security guard was only required to watch and guard the Club House. Mr. Saif’s description of the Club House was a large room with no partitions, he insisted no patrol rounds for the guard on duty was required. Federal further claimed that there were sufficient lighting at the Club House throughout the night. Consequently, Mr. Singh did not need to use a torch because he was not required to patrol the Club House. In any event, he was supplied with a torch in case of need.
2. Mr. Saif claimed he took a random check of the construction site on 5 February 2006. He found the Club House locked from the inside and Mr. Singh came out to meet him. Mr. Singh had mistaken him as his supervisor Mr. Saleem and told him he was poor and needed to make some quick money to retire to his home country. He claimed Mr. Singh suggested a fake accident at work in order to deceive the insurance company for compensation. He offered Mr. Saif a share of the money to be the eye witness to the accident. Mr. Saif said he simply told Mr. Singh “I will see, but at present, you must discharge your duty”.
3. Mr. Saif claimed that on the night of 16 March 2006 at around 20:20 hrs, he went to the construction site again. He found the entrance locked from the outside with a padlock. Concluding Mr. Singh was not inside the construction site, he called Mr. Singh’s supervisor Mr. Saleem and told him he was at the door of the Club House and Mr. Singh did not answer his knock. Mr. Saleem called him back to say that Mr. Singh had called him to report that everything was all right at the Club House. Mr. Singh claimed he was at the construction site at the time. Mr. Saif told Mr. Saleem to ask Mr. Singh to open the door to let him in, but Mr. Saleem could not reach Mr. Singh again that night. He waited a further 30 minutes at the entrance of the Club House but decided to give up waiting and went to another site in Tseung Kwan O. At around 22:30 hrs, Mr. Saleem reported to him that Mr. Singh had telephoned him to say he had a slip and fall accident at the construction site and was on his way in an ambulance to the hospital. Mr. Saif said he told Mr. Saleem to go to the Club House to check the site before going to the hospital to see what had happened to Mr. Singh. He claimed Mr. Saleem told him later that the doctor had informed Mr. Singh there was no foreign body in his eye, there was no fracture and he could be discharged from the hospital but Mr. Singh insisted on staying until there was transport to take him home in the morning.
4. Because of his previous visit to the construction site on 5 February 2006 and told of Mr. Singh’s plan to deceive the insurance company, Mr. Saif said he decided to transfer Mr. Singh to a day shift site and send a replacement to the construction site. However, on 14 March 2006, the replaced guard had taken leave and Mr. Singh was transferred back to the construction site because of his knowledge of the site. He believed this gave Mr. Singh an opportunity to fake his injuries.

The 2nd Defendant’s case

1. Mr. Yu, the project manager of Jetline, agreed Mr. Singh had reported duty on 31 October 2005. He was accompanied by his son who spoke Cantonese while Federal was represented by Mr. Lee, a manager of Federal. The four of them had walked through the patrol route at the site. Mr. Singh was told his main duty was to guard the site office where office equipments, documents and computers were stored. He produced the patrol route plan that he introduced to Mr. Singh on 31 October 2005 (page 85 of the documents bundle). Mr. Yu said he understood Federal had provided a torch to Mr. Singh, and Jetline had torches freely available at the site office which Mr. Singh could use. Mr. Yu claimed that between October 2005 and October 2006, he was stationed at the site. He had walked through the site daily and if he found rubbish lying around or light bulbs damaged he would ask the site workmen to fix it immediately. Furthermore, there were 4 to 5 cleaning workers recruited by Jetline responsible for collecting and clearing rubbish daily. There was also sufficient lighting at the site, though there might have been on past occasions shut down of lighting due to circuit testing, there were back-up lighting at the site to light up the site. He had also instructed Mr. Singh to stay inside the site office if power supply at the site was cut off.
2. Mr. Yu recalled at about 10:30 p.m. on 16 March 2006, he received a call from Mr. Singh who told him he was “dazzle”. As he did not fully understand what Mr. Singh said, he told him to take sick leave if he was ill. At around 11:00 p.m., he received a call from a paramedic and discovered Mr. Singh had called the police from the site. He talked to Mr. Singh who told him he was injured but said he was fine.
3. Mr. Yu disagreed that Mr. Singh’s patrol route required him to go under the staircase next to the site office. He further disagreed there was any loose metal piping at the alleged accident location under the staircase. He insisted there should be no rubbish lying around at the construction site because little construction work was taking place at the time when it was under inspection by the Fire Services Department. He further claimed there should be sufficient lighting at the construction site for Mr. Singh to conduct his patrol rounds safely.

Analysis

1. According to the medical report of Dr. Rocky Wong, Associate Consultant at the A & E Department of Tseung Kwan O Hospital (pages 100 to 101 of documents bundle), Mr. Singh was seen by Dr. Wong at A & E Department at 23:30 hrs on 16 March 2006. He was examined by Dr. Wong who found sand at the inferior conjunctiva of the right eye, abrasions over his right knee and right elbow. Mr. Singh had also told the doctor that he had a slip and fall accident while patrolling the construction site.
2. According to Mr. Yu, Mr. Singh had called him around 10:30 p.m. that evening and told him he had fallen down and hurt his head. At around 11:00 p.m., Mr. Yu received a call from the ambulance paramedic who told him he found an injured person at the construction site. The injured person was Mr. Singh.
3. The evidence from Dr. Rocky Wong of the A & E Department of Tseung Kwan O Hospital and Mr. Yu both supported Mr. Singh’s claim that he had an accident on the evening of 16 March 2006. The Tseung Kwan O Hospital medical reports provided strong evidence from independent sources that Mr. Singh was found with sand over his right eye even though they confirmed he could not see clearly with his right eye due to an old retinal detachment. However, the abrasions to his right knee and right elbow were new.
4. Further, according to Mr. Yu, he received a call from the ambulance paramedic at around 11:00 p.m. that night. He also had a conversation with Mr. Singh earlier that night when Mr. Singh told him he had fallen down and hurt his head. There are therefore strong evidence to show that Mr. Singh did have an accident at the construction site.
5. Mr. Saif claimed he was making regular random checks on the company’s security guards and visited the construction site on 5 February 2006. Even if Mr. Saif did indeed visit it the first time on 5 February 2006, he seemed to be ignorant that the guard was required by Jetline to patrol the Club House. He claimed Federal would have charged a different rate for guards required to do patrolling rounds. From Mr. Saif’s description, the guard was supposed to guard the Club House which consisted of a large room with no partitions. He was not present on the first day Federal took up the contract with Jetline, it was Mr. Lee, the then manager, who had accompanied Mr. Singh when Mr. Yu introduced the guard’s duties to Mr. Singh, this perhaps explained why Mr. Saif was unfamiliar with the Jetline contract and the duties involved. It is also possible he might have visited a wrong part of the Tin Kong Long Station Development site and knocked at the wrong door on 16 March 2005 if he did visit the construction site that same night.
6. Mr. Saleem, Mr. Singh’s supervisor, was not called as a witness. Mr. Singh’s evidence on what Mr. Saleem told him on the night of 16 March 2007 remained uncorroborated hearsay evidence. I find it unreliable.
7. Further, Mr. Saif’s impression of Mr. Singh’s attitude and conduct differed greatly from the impression Mr. Yu had of Mr. Singh. Mr. Saif described Mr. Singh as someone who was looking for an opportunity to cheat the insurance company for a large compensation. Mr. Yu, on the other hand, described Mr. Singh as someone who reported duty not only punctually, he was often early. Mr. Yu said he met Mr. Singh frequently at the construction site, greeted him and chatted to him on many occasions. It is clear that Mr. Yu considered Mr. Singh a conscientious and punctual security guard whose performance he was happy with.
8. I find Mr. Yu’s evidence on the performance of Mr. Singh to be reliable for Mr. Yu had frequent contacts with Mr. Singh when he was posted at the construction site. Mr. Saif had only met Mr. Singh once before the accident. The day-to-day contact Federal had with Mr. Singh was through Mr. Saleem who did not come to court to give evidence.
9. Based on the evidence before me, I am satisfied Mr. Singh was injured on the night of 16 March 2006 at the construction site. The doctor’s findings also confirmed Mr. Singh had sustained recent injuries to his right knee and right elbow and foreign particles were found over his right eye which the doctor removed at the hospital. The injuries found by the doctor at A & E Department of Tsueng Kwan O Hospital were consistent with injuries suffered at a slip and fall accident. Though Mr. Singh might have wrongly attributed or blamed his blindness in the right eye to the accident, the injuries to his right knee and right elbow were consistent.

The Cause of Accident

1. On the night of 16 March 2006, Mr. Singh had carried out his first two patrol rounds with no problems. At the third round, as he approached the main staircase of the Club House, he claimed he found some light bulbs under the stairs not functioning. Nevertheless, he still approached the area, he then slipped on a piece of loose piping and fell.
2. Both Federal and Jetline deny liability under the Occupiers’ Liability Ordinance and statutory duty of care. Federal claimed Mr. Singh was not required to make patrol rounds. Mr. Singh was nevertheless given a torch with batteries and a safety helmet for the job and he should have made use of these at the construction site.
3. Jetline, on the other hand, exhibited a plan of the patrol route at the construction site Mr. Singh was required to take every night (page 85 of the documents bundle). Mr. Yu emphasized that according to his instructions to Mr. Singh, the patrol route did not include the area under the staircase and Mr. Singh should not have gone beyond the patrol route designed for him. Mr. Yu claimed he had made sure the lights would be working all the time during the relevant period he was stationed at the construction site. Furthermore, he claimed the last cleaning was done at 6:00 p.m. it is therefore not possible for the floor at the construction site to be littered with loose pieces of metal piping or other construction materials. Yet Mr. Singh claimed he had seen a loose piece of metal piping on the floor earlier that night but failed to avoid it when he made his third round.
4. Based on the medical reports and Mr. Singh’s evidence, I am satisfied Mr. Singh did have an accident in the manner he described at the construction site on 16 March 2006. On the other hand, I am not convinced that he was unable to find a torch at the site office. Even though he claimed he was not provided with a safety helmet and a torch, I am persuaded that at Jetline’s site office, there were a few torches which Mr. Singh could have used. I accept Mr. Yu’s evidence that he had instructed Mr. Singh to do the patrol rounds according to the route on the layout plan and he was shown the patrol route on the first day of duty. It is possible Mr. Singh had mistakenly included the area under the staircase as part of his patrol route.

The Law

1. Section 3 of the Occupiers Liability Ordinance, Chapter 314 states:-

“(1) An occupier of premises owes the same duty, the “common duty of care”, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-

(a) …………….

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-

1. where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
2. where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
3. S.38A of the Constructions Sites (Safety) Regulations Cap. 59 I provides:

(2) The contractor responsible for any construction site shall ensure that, so far as is reasonably practicable, suitable and adequate safe access to and egress from every place of work on the site is provided and properly maintained.”

1. Section 13 of the Occupational Safety and Health Regulation, Chapter 509A states:

“(1) The person responsible for a workplace must ensure that the workplace is sufficiently well lit, by natural or artificial lighting, to ensure the safety and health of employees and other persons who are at work at the workplace.”

Occupiers Liability

1. The occupier of the construction site is Jetline, the main contractor of the construction site. Mr. Singh was a visitor in the sense he worked there on the instruction of his employer, Federal. The question therefore is, did Jetline owe a duty of care to Mr. Singh who was lawfully working at the construction site as a security guard required to make patrol rounds? Under Section 3(4) of the Ordinance, occupiers of the premises owed a common law duty of care for damages caused to a visitor by a danger even though he had been warned of it. The Court will then look at whether damage was caused due to the faulty execution of work by an independent contractor employed by the occupier, and whether the occupier had acted reasonably in entrusting the work to an independent contractor whose competence he was satisfied with and if the work was properly done. In the present case, Mr. Singh was shown his duties and the patrol rounds by Mr. Yu personally. Jetline entrusted the guard duties to Federal which it believed to be a competent security guard company.
2. Federal, on the other hand, claimed it had ensured Mr. Singh was properly trained for the job since he attended a training course and possessed a certificate for security guards. Federal produced two sets of “instructions for duty guards” and “safety rules for construction site” a copy of which was given to Mr. Singh when he was employed. Under the “safety rules for construction site”, security guards are required to wear a safety helmet at all times while on duty. It also instructed its staff to do various things such as to check all workers’ CITA cards at entry to the site and to keep records of workers’ CITA cards etc. (page 226 of the documents bundle). These “safety rules for construction site” are obviously designed for general purposes for safety guards working at building sites. The instructions for a duty guard (pages 227 to 228 of the bundle) are more relevant in Mr. Singh’s case, they were designed for general purposes and the requirements and duties at each site may vary. It is not clear exactly what instructions Federal gave Mr. Singh when he was first posted to this construction site. Mr. Saif was clearly mistaken when he emphasized the contract Federal signed with Jetline was for a sedentary security guard not required to go on patrol rounds. The agreement between Jetline and Federal made no reference as to whether the services provided was for a non-patrolling security service or otherwise (page 291 of documents bundle). It is highly likely that Mr. Saif was simply ignorant of the Jetline’s job requirements. I find Mr. Saif’s evidence unreliable.
3. I am satisfied Mr. Singh’s duty at the construction site as the night security guard did include patrol rounds of the Club House. He should take adequate care of his own safety and keep a proper look-out while he was doing his rounds. At the same time, his employer Federal should have equipped him for the job. Mr. Saif had no idea Mr. Singh’s duty included patrolling rounds, nor did he have any idea of the size of the construction site.
4. Under Section 3 of the Occupiers Liability Ordinance, Jetline has a duty to ensure visitors such as Mr. Singh who was invited to work at the premises as a security guard was working in a reasonably safe environment. Therefore, Jetline owed a common duty of care to Mr. Singh to provide a safe system of work, a place with sufficient lighting free from debris likely to cause injuries to him. This duty is owed also under regulation 38A (2) the Construction Sites (Safety) Regulations Chapter 59 sub. leg. I which provided that the contractor responsible for the construction site has a duty to ensure there is suitable, practical and adequate safe access to and egress from the place of work, and the site should be properly maintained. In spite of the daily inspection and cleaning, I am satisfied Mr. Singh had stepped on a loose piece of piping and fell down on 16 March 2006.

Common Law Duty of Care of the Employer

1. In the case of *Wilson v Tyneside Window Cleaning Company* [1958] 2 QB 110 where Parker L.J. referred to the master’s duty towards its servants:

“….but for myself I prefer to consider the master’s duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in *Smith v. Baker & Sons,* 1891 AC 325, 362 to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk. That general duty applies in the circumstances of every case; but the governing words “reasonable care” limit the extent of the duty in the circumstances of each case. Accordingly, the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party.”

1. The question here is whether Federal took reasonable care not to expose Mr. Singh to unnecessary risk even though the construction site was not under Federal’s control but under the control of Jetline.
2. In my view, Federal owed a duty to Mr. Singh to make sure that, under reasonable circumstances, the working environment is safe and that Mr. Singh should be equipped with the necessary tools to carry out his work. Unfortunately, Mr. Saif blamed Mr. Singh for going on patrol rounds and claimed the work was sedentary and confined to a large room. The reason for Mr. Saif’s misunderstanding of the duties required by Jetline was probably because Mr. Saif was not present when Mr. Yu explained the duties to Mr. Lee and Mr. Singh on 31 October 2005. Neither was Mr. Saif present when the agreement was signed between Federal and Jetline on 29 October 2005. Even though Mr. Saif claimed he made random checks at contracted sites of Federal, he clearly did not know the size of this construction site or the duties involved. Under such circumstances, it cannot be said that Federal had done anything to ensure its employees were provided with a safe system of work or taken reasonable care to ensure they would not be exposed to unnecessary risks.
3. I find the 1st and 2nd Defendants both liable for failing to provide a safe system of work and a safe working environment for Mr. Singh and that a common duty of care was owed to Mr. Singh. Jetline is also liable under the Occupiers Liability Ordinance.

(3) Contributory Negligence

1. Lord Denning in the case of *Jones v Livox Quarries Ltd., Same v Same* [1952] CA 608 at page 615, held:

“Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability, but on causation.”

1. According to Mr. Yu, the box where Mr. Singh had placed some of his personal articles was found to contain a torch. Further, there were also a few torches on the table at the site office which Mr. Singh could have used during his patrolling rounds. Mr. Singh was trained the skills to cope with difficult situations at the security guard training course. Mr. Saif produced various written instructions for duty guards, safety rules for construction site and contingency plan directions which he claimed were given to Mr. Singh when he was employed. Had Mr. Singh followed these instructions, he should have known better than to approach an area where the lights had gone off without a torch. According to the layout plan (page 85 of the documents bundle) and the evidence of Mr. Yu, Mr. Singh was not supposed to patrol the area under the staircase. If Mr. Singh had gone on his patrolling rounds without a torch and when he found the lights had gone off under the stairs he should not have approached that area which did not form part of his patrol route. Secondly, Mr. Singh admitted he had seen a piece of loose metal piping on the floor behind the staircase at his earlier patrolling rounds. In spite of that knowledge, he failed to remove the metal piping from the floor and proceeded to the staircase in spite of dim lighting. As a security guard, he is expected to be alert and careful. Furthermore, it was a site where he had been posted for many months that he ought to know well. He was in a much better position compared to an ordinary visitor at the site. For the aforesaid reasons, I find Mr. Singh had contributed to the accident, and I assessed the contribution at 50%.

**Quantum**

Pain, Suffering and Loss of Amenities (PSLA)

Medical evidence

1. Dr. Lee Yuen-lun, Senior Medical Officer at the Department of Orthopaedics & Traumatology of Tseung Kwan O Hospital reported on 22 November 2006 and confirmed Mr. Singh showed diffused back tenderness with spasm. He also had diffused tenderness around the right knee with movement limited by pain. There was no abnormality detected on the right elbow. He concluded Mr. Singh sustained soft tissue injury, he was prescribed medication and physiotherapy. Dr. Lee’s report and the report from the physiotherapist of 5 September 2006 (pages 108 to 109 of documents bundle) showed Mr. Singh’s condition had improved after 4 months of physiotherapy. Mr. Singh received follow-up treatments at the Tseung Kwan O Hospital up to 22 August 2006. He was then referred to the Medical Assessment Board for assessment.
2. Dr. Chan Cheuk Hung of the United Christian Hospital Department of Ophthalmology, confirmed Mr. Singh to have an old total retinal detachment of the right eye. He found Mr. Singh’s right eye had already become totally blind and that it was extremely unlikely his right eye condition was “due to his claimed recent injury”. The supplemental report of Dr. Li Siu Hung, Resident Specialist of the Department of Ophthalmology of United Christian Hospital further confirmed Mr. Singh’s retinal detachment was likely to be long standing (pages 113 to 114 of documents bundle).
3. A subsequent X-ray at the Tseung Kwan O Hospital of Mr. Singh’s right knee reviewed possible lateral condyle avulsion fracture. Mr. Singh was reassessed on 20 March 2006 and referred to the fracture clinic for further follow-up and rehabilitation until 3 September 2006. According to the medical report of Dr. Wong Kwok Shing, Patrick (pages 115 to 117 documents bundle), specialist in orthopaedics and traumatology, Mr. Singh told him he had mild right knee pain after walking for 30 minutes, could climb stairs slowly and had mild low back pain after sitting for over 20 minutes and mild pain over his right elbow with reduced range of motion. He also complained he was no longer able to play any sports. Dr. Wong confirmed Mr. Singh suffered from mild low back tenderness and reduced lumbar spine movement, mild reduced right elbow movement, tenderness over PF joint and medial compartment compatible with the degeneration observed on X-rays. The range of movement of his right knee was mildly reduced. Dr. Wong concluded that Mr. Singh is expected to have mild residual low back pain and mild residual right knee pain as a result of the contusion injury sustained upon his pre-existing degeneration. He assessed Mr. Singh to have a 3 % whole person impairment for residual pain due to the soft tissue injury which he believed was genuine. He further estimated Mr. Singh’s loss of earning capacity to be 5%. He did not consider Mr. Singh would have any problem resuming his job as a security guard though there may be minor reduced efficiency on patrolling duties. He did not recommend Mr. Singh to carry on delivering heavy goods due to his age and due to the degeneration of the knee.
4. The Defendants instructed orthopaedic surgeon Dr. Lau Hoi Kuen to examine Mr. Singh on 7th June 2007. Dr. Lau examined the X-rays taken on both knees of Mr. Singh and found degenerative changes in both knees. He also found a small bone chip at the edge of the right lateral tibial condyle but bony abnormality of the right elbow was absent. He agreed Mr. Singh could have suffered avulsion injury over the lateral aspect of his right knee in the alleged accident but the fracture had healed without residual laxity of the joint. He further found there was absence of muscle wasting of his right thigh and calf which would suggest he had recovered well from the injury to his right knee. He concluded Mr. Singh had recovered well from the right elbow injury and any possible residual pain in his right elbow would only be of a minimal degree. He expressed Mr. Singh should be able to return to work as a security guard or a part time coolie, any inability to work as a security guard or coolie would be due to age rather than the accident.
5. The medical evidence showed Mr. Singh had suffered soft tissue injuries at the accident involving his right knee and his lower back. The doctors found his right knee suffered from degenerative changes. Mr. Singh himself admitted after receiving treatments and physiotherapy his condition had improved. In November 2006, he returned to work for Federal as a security guard.
6. Mr. Singh claimed he used to play a lot of sports when he was in India and he had continued to engage in sports with his grandchildren about three or four times a week before the accident. He claimed he can no longer engage in such activities now. He was 63 years old at the time of accident. At the trial in March 2008, he was approaching 66. In the assessment of Mr. Singh’s loss of amenities due to the accident, I take into account Mr. Singh’s age and pre-existing degenerative changes on his right knee.

Analysis

1. I have been referred to a number of authorities on awards made in Hong Kong. I do not find the awards made in the 1980’s of any assistance.
2. Mr. Millar, representing Mr. Singh suggested $130,000 under this head. He relied on the case of *Ahmed Masood v Chung Kau Engineering Company Limited* DCPI 517/03 where the 57 years old plaintiff suffered mild back sprain at an industrial accident. He continued to suffer from residual pain and stiffness in his back and right leg and numbness to his right leg. The doctor gave him over 5 months of sick leave. The sum of $130,000 under PSLA was awarded by the court.
3. Mr.McLeish and Mr. Hui, representing the 1st and 2nd Defendants respectively, referred to the case of *Mohammed Ashaq v Royal Honour Industrial Limited,* one of my decisions on 27 November 2007 where I awarded the Plaintiff the sum of $50,000 under PSLA. The second authority is *Tam Fu Yip Fip v Sincere Engineering & Trading Company Limited* HCPI 473/2006 where Saw J. awarded the plaintiff who suffered from constant low back pain, ant-biting feeling and pain episodes on both legs, the sum of $75,000 under PSLA. He believed the Plaintiff had exaggerated his complaint after the accident resulting in a soft tissue injury to the back. He also found the plaintiff had suffered from a pre-existing degenerative back disorder. The third case referred to me is *Cheung Yu Tin Alvin v Ho Hon Ka* DCPI 853/2004 where Deputy Judge W. Lam awarded the sum of $25,000 under PSLA to the 29 years old plaintiff who suffered from low back pain at an accident. The Plaintiff was given 4 days sick leave. He was assessed by the medical expert to have suffered from 1% permanent impairment.
4. As Mr. Singh had returned to work for Federal in mid November 2006 and he had continued to work as a construction site security guard up to now. Clearly, he was and is able to carry on with his work in spite of the soft tissue injuries sustained at the accident. On the basis that he had suffered soft tissue injuries to his right knee and lower back from which he had recovered, the appropriate award under this head is assessed to be $60,000.

Loss of Earnings

A. Pre-trial Loss of Earnings

1. Mr. Hui, Counsel for Jetline, suggested adopting the average monthly income of Mr. Singh before the accident in calculating his loss.

monthly wage: $20,909 ÷ 4.5 = $4,646.44

daily wage: $4,646 ÷ 30 = $154.88 ($155)

I find this method of calculating the average income of Mr. Singh to be more appropriate than the simple adoption of the February 2006 salary.

1. Both parties accepted 167 days of sick leave to be reasonable. Therefore, the loss of pre-trial earnings during the sick leave period is :

HK$155 x 167 days = HK$25,885.00

1. On top of the sick leave paid there is a 5% MPF added to this sum. 5% x $25,885.00 = $1,294.25.

$25,885 + $1,294.25 = $27,179.25.

Job at Guru Kirpa Enterprises

1. Mr. Singh claimed he had been working for a provision shop called Guru Kirpa Enterprises (“Guru”) for $200 a day while working full time for Federal. He claimed that due to the accident, he is no longer able to carry heavy loads which is the job requirement for a delivery man at Guru. Mr. Singh claimed that while he was working on night shift, he would return home to sleep for 4 hours before reporting for duty at Guru at around 12:30 p.m. After finished working for Guru he would report for duty to work the night shift at the construction site. When he was put on day shift duty, he would start work at 7:00 a.m. until 7:00 p.m., then he would work for Guru from 7:30 p.m. until midnight.
2. When questioned how he could find time with two jobs to sleep, to eat, to travel to and from work and to play basketball or football 3 to 4 times a week with his grandchildren. He said he slept less than 4 hours each day and the job at Guru would finish within 2 hours or so, he would then play 20 minutes of basketball or football with his grandchildren. He further claimed that on the day when he was required to work overtime as a security guard he would call up Guru and tell him he would not be able to return to the shop to work that day.
3. I find Mr. Singh’s evidence on his managing two jobs, sleeping and engaging in active sports incredible for a man of over 62 years. He admitted in Court that he spent around 60 to 70 minutes traveling each day and that he would not fall asleep when he was on night shift duty. In that case, he would not have found time to sleep and eat let alone play basketball or football three or four times a week. Furthermore, it is highly unlikely for anyone to find a delivery job that would only require working 2 to 3 hours a day which paid $200 a day, 30 days a month. When asked about the job nature at Guru, Mr. Singh claimed it involved delivery of heavy sacks of lentils and flour to the local residents. For longer distance deliveries, the owner Mr. Sukhmander Singh would make delivery by car. It is unfortunate that Mr. Sukhmander Singh failed to give evidence at the trial. Mr. Singh produced a letter from Mr. Sukhmander Singh dated 19 December 2006 certifying Mr. Singh was working as a delivery man between 10 October 2005 and 16 March 2006 for $200 a day at Guru. However, the 1st Defendant produced an affirmation from Mr. Sukhmander Singh denying the authenticity of that letter and denied Mr. Singh had ever worked at his shop. Consequently, I place no weight on either of these two documents.
4. There remains therefore only Mr. Singh’s allegation that he had a second job at Guru while he worked for Federal. He was not able to produce any supporting documents such as employment contract, wage slips or tax return. I find it difficult to accept Mr. Singh had a second jobs working for Guru at $200 per day for 30 days a month. It is inconceivable for a small provision shop serving the local residents to employ a delivery man on a regular monthly basis at $200 per day just to make local deliveries. This delivery job which Mr. Singh claimed he was only required to work 4 to 5 hours a day and sometimes 2 hours a day would pay him a salary of $6,000 a month, $1,500 more than his security guard job with Federal. It is further inconceivable for any provision shop to be ready to adjust the hour of employment according to the employee’s full time job. A local Indian provision shop simply could not keep flexible opening hours according to the availability of the delivery man or allow him to make late deliveries at night to the local residents. Mr. Singh claimed he was often able to finish his work within 2 hours. That would mean he was paid $100 an hour on those days. I find that most incredible.
5. I completely reject Mr. Singh’s claim that he was working for $200 a day at Guru at the time he was working a full 12 hour shift as a security guard with Federal. It is most unlikely for Mr. Singh to be able to maintain both jobs at the same time, or for Guru to employ him on such basis.
6. The Plaintiff further claimed a period of post-sick leave loss of earnings until he returned to work. I am prepared to accept that it would take him a period of time after his sick leave to find suitable alternative employment. I therefore allow a post-sick leave pay of 30 days equivalent to $155 x 30 = $4,650.
7. Mr. Singh is no longer claiming damages for loss of future earnings or loss of employment opportunity. He is claiming special damages to cover his medical expenses and traveling expenses at $3,000. I find that a reasonable sum and I allow it in full.

Conclusion and apportionment

1. Jetline is liable under occupier’s liability and Federal for breach of common duty of care. Both are liable under statutory liability for failing to keep a proper system of work. I find it reasonable to apportion the negligence between Federal and Jetline equally.

Summary

1. PSLA $60,000.00

Pre-trial loss of earnings

Sick leave period (167 days x $155) $25,885.00

5% MPF $1,294.25

30 days post-sick leave job hunting $4,650.00

Special damages $3,000.00

Total $94,829.25

Less Employee’s Compensation $27,071.60

Total $67,757.65

Less 50% contributory negligence $33,878.825

Total $33,878.825

($33,878.83)

Interests

1. Interest on special damages is allowed at half judgment rate from the date of accident to date of judgment. Interest on general damages at 2% p.a. from the date of writ to date of judgment, thereafter at judgment rate.

Costs

1. Costs to follow the event. The Plaintiff’s costs to be borne by the Defendants to be taxed if not agreed. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations. The order will be made absolute should there be no application in writing within 14 days hereof.

(H.C. Wong)

District Judge

Parties:

Mr. N. Miller of Messrs. Littlewoods for the Plaintiff

Mr. McLeish instructed by Messrs. Susan Liang & Co. for the 1st Defendant.

Mr. David Hui Tai Wai instructed by Messrs. Chan & Tsu for the 2nd Defendant.