# DCPI 580/2011

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# PERSONAL INJURIES ACTION NO. 580 OF 2011

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BETWEEN

CHU SIO IONG (朱小容) Plaintiff

and

CHEUNG HO YIN (張浩然) 1st Defendant

A.S.WATSON & COMPANY, LIMITED 2nd Defendant

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Before: His Honour Judge Kent Yee in Court

Dates of Hearing: 25 – 26 March 2013

Date of Judgment: 7 May 2013

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JUDGMENT

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*Introduction*

1. This action of the plaintiff (“**Chu**”) is for damages for personal injury she sustained in an accident in the course her employment with the 2nd defendant (“**Watson**”) on 9 April 2008. The accident was allegedly caused by the 1st defendant (“**Cheung**”), who was Chu’s colleague and the accident took place at their workplace, namely, Park N Shop (“**the Supermarket**”) at Kam Ying Court Shopping Centre, 9 Kam Yip Road, Ma On Shan, New Territories.

*Plaintiff’s case and evidence (liability)*

1. Chu was born in December 1960. At the time of the Accident, Chu was 47 years old. She was employed by the 2nd defendant to work as a part-time store assistant at the Supermarket on 8 March 2008. Her hourly wage was HK$25.00.
2. Chu said at the job interview with one Mr Tam, who was the manger of the Supermarket, Mr Tam told her to use a plastic milk crate as a makeshift step stool to deal with items placed on high shelves beyond her reach. She was also told that such milk crates were available at the warehouse of the Supermarket.
3. At about 4:45 p.m. on 9 April 2008, Chu was sitting on a milk crate to check the expiration dates of sauce products on the low shelves. Cheung ran up to her. Chu stood up and Cheung told her that some items on the highest shelf right in front of her were misplaced. Then a supervisor known to Chu as Ah Chau also came and joined the conversation. Chu then stood up and talked to Ah Chau. Ah Chau asked Chu to re-arrange the items on the highest shelf so that they were displayed in their proper place. Chu then asked Ah Chau to show her the display plan so that she could re-arrange the items in accordance with the display plan. Ah Chau then took a few photographs of the shelves and left.

1. Chu intended to resume her work with the lower shelves. She lowered her body to sit on the milk crate. She assumed that the milk crate was in its original position and she did not look back to confirm its presence. She fell onto the floor on her buttock eventually without knowing that the milk crate had been removed. She was in great pain and she saw Cheung standing on the milk crate about 1.5 feet away from her. She got on her feet. Chu asked Cheung why he had taken away her milk crate without giving her any notice. Cheung gave Chu back the milk crate and walked away. Cheung did not reply to her. Chu also blamed Ah Chau for not giving her support when she fell down. At the same time Chu saw Mr Tam walking towards them.
2. Under cross-examination, she maintained that from the moment when she stood up to talk to Ah Chau to the very moment she fell onto the floor, it lasted within one minute. Chu was adamant that, during the one minute, she did not move around and basically she only stood still with many bottles of oyster sauces and a bucket of water around her feet lying on the floor.
3. Chu continued to work until 7 in the evening. She went to Prince of Wales Hospital (“**PWH**”) for treatment after work in that evening.
4. A milk crate used in the Supermarket was produced to Chu during the cross-examination. Chu confirmed that it looked the same as the milk crate involved in the accident. Measurements of the milk crate were taken and they were, as agreed by Miss Phillis Loh, counsel for the defendants, 15.5” (w) x 13”(l) x 11”(h).
5. Chu’s claim against the defendants is based on negligence. As against the 2nd defendant, She relies on some addition grounds in breach of express and/or implied terms of contracts of employment and breach of breach of statutory duties including those under the Occupiers’ Liability Ordinance, Cap. 314 and the Occupational Safety and Health Ordinance, Cap. 509.

10. The defendants have filed only one witness statement of Tam Chi Wah dated 4 December 2009. Tam Chi Wah however did not testify for unknown reasons. I do not attach any weight to this witness statement.

11. In the premises, the account of Chu about the accident was not contradicted by any contrary evidence. There was no inherent probability in her account and I do find that the accident occurred in the way as recounted by Chu.

*Defendants’ position on liability*

12. In her opening submission, Miss Loh indicated that the defendants accept liability subject to the issue of contributory negligence. In her closing submission, she submitted that being an adult, Chu should take reasonable steps to take care of her own safety. She should have first checked the position of the milk crate when she decided to sit down on it to resume working. She should have done so not because she had reason to believe the milk crate might have been removed (which is the pleaded case of the Defence: §4(a)) but because the size of the milk crate. If Chu had done so, the accident could have been avoided. Therefore, Miss Loh submitted that Chu should be held to be contributorily negligent.

13. Miss Loh referred me to *Yu Pun Yuen v Ng Kwok Man trading as East Mountain Eng. Co. (Bankruptcy) & Ors.*, unreported, HCPI 293/2002, 9.5.2003. There, the plaintiff was a technician. He fell off from an “A” type folding ladder and sustained injuries. He was working initially on the third step of the ladder to drill a hole and he was able to see his colleague holding onto the ladder for him. He assumed his colleague to do the same when he climbed up the ladder to drill other holes. After 8 to 10 minutes he decided to descend from the ladder without checking again whether his colleague was stilling holding the ladder for him.

14. Suffiad J for three reasons found carelessness on the part of the plaintiff. First, the plaintiff knew that the physical circumstances of the workplace with a sloping floor and drainage rendered it unsafe for the use of the ladder. That was the reason why the plaintiff instructed his colleague to hold on to the ladder. Secondly, the plaintiff was experienced in using ladders and he understood that the shifting weight of a person descending such a folding ladder would normally cause the ladder to be less steady as opposed to when the person is simply perched on the ladder and not moving. Thirdly, the plaintiff accepted that it was an unusual case that he was still holding an electric drill in his hand while descending the ladder instead of lowering the drill down to a colleague before descending. All these necessitated the plaintiff to take the simple step by taking a sideways glace downwards to ensure his colleague was in fact holding onto the ladder before descending. Suffiad J in the end assessed the plaintiff’s own contributory negligence at 20%.

15. The facts of the present case are, however, very different. Nothing similar to the three reasons for finding the plaintiff negligent in the *Yu Pun Yuen* case can be found here. The physical environment in the Supermarket did not cause the milk crate to move on its own motion. Chu needed no one else to ensure that the milk crate remained in the same position. Chu herself did not do anything to make the milk crate more likely to be removed.

16. I do not think the issue is whether it was a simple step that Chu should check whether or not the milk crate remained where it had been. The issue is whether in the circumstances of this case, it was reasonable for Chu to assume that the milk crate remained intact behind her.

17. Chu only stood up for a brief moment. She did not leave where she stood. She was working with the sauce products on the floor. It should be clear and obvious to her colleague and indeed any shoppers in the Supermarket that Chu was using the milk crate behind her. There was no reason for anyone to remove the milk crate without giving her prior notice. I find that it was reasonable for Chu to assume that the milk crate remained behind her when she was sitting down and reject the allegations in the pleaded case of contributory negligence.

18. On the other hand, the flat surface of the milk crate was not small, as shown by its measurements. It was comparable to that of an ordinary chair. I do not accept that because of the small size of the milk crate, Chu should take a precautionary step, however simple, to ensure that she would land on the milk crate properly.

19. I thus come to the conclusion that there was no contributory negligence on the part of Chu. I find the defendants fully liable as pleaded.

*Quantum*

20. I now turn to the amount of damages, which is a hotly disputed issue in these proceedings.

*Injuries and Treatment*

21. As mentioned above, Chu first received treatment at PWH in the evening of the material day. In the resultant medical report compiled by Dr Yim Wai Ting, it was recorded that physical examination showed diffuse tenderness at the lumber spine and that X-ray did not show any fracture. Permanent disability was not expected.

22. On 12 April 2008, three days after the accident, Chu went to Ma On Shan Health Centre (“**MOSHC**”) for a follow up physical examination. It was found that Chu had local tenderness over lower lumbar and sacral region. The range of movement of back was normal and Chu was given oral and local analgesic and was referred for physiotherapy at Lek Yuen General Out-Patient Clinic (“**LYGOPC**”) on 20 April 2008.

23. In the medical report of LYGOPC dated 3 December 2008, it was recorded that Chu’s physical examination revealed mild tenderness over lumber spine and buttock region.

24. Chu was granted sick leaves covering short periods from 12 April 2008 to 31 July 2008 by both MOSHC and LYGOPC.

25. Chu attended the Accident & Emergency Department of North District Hospital on 27 April 2008 and the examination taken revealed that her general condition was satisfactory. Chu was treated with analgesic and was referred to family doctor for further assessment.

26. On 9 July 2008, Chu visited Dr Chau, a private specialist in orthopaedics and traumatology. The examination showed that she had diffuse tenderness of her lumbar region and it is noteworthy that no muscle spasm or guarding was found. Active range of movement of her back was diminished. There was no neurological deficit of her back. The clinical diagnosis was soft tissue injury of back.

27. On 2 September 2008, MRI lumbar spine conducted at PWH showed no evidence of nerve root compression that could account for her legs symptoms. It was recorded in a medical report dated 17 May 2011 compiled by Dr Lam of Alice Ho Miu Ling Nethersole Hospital (“**AHMLNH**”) that the MRI showed normal appearance apart from mild desiccation in the signal of the lower lumbar disc and a very small posterior disc bulge at L5/S1.

28. My attention was drawn to the statement in the said report that according to old medical notes, Chu complained of back pain and lower limb numbness after operation but Chu denied to Dr Lam about this history.

29. On 13 December 2008, Chu was admitted to the Department of Orthopaedics and Traumatology in AHMLNH. There Chu complained about increasing back pain and it was over lower lumbar spine associated with both lower limbs numbness. On physical examination Chu was found to have tenderness over the lumbo-sacral spine. X-ray showed decrease in lumbar lordosis. Chu was treated with physiotherapy and analgesics and her pain improved. She was discharged two days later.

30. In 2009, Chu’s medical condition took a different course. She was referred to Urology Clinic of PWH on 31 August 2009 for lower urinary tract symptoms on account of her complaint of sense of incomplete emptying and post-void urinary incontinence and dribbling after the accident. She also complained about haematuria for one year. However, investigations showed no abnormalities and anti-cholinergic drug was prescribed for symptom control.

31. In January 2010, Chu attended the Li Ka Shing Psychiatric Clinic (“**LKSPC**”) for the first time. She told Dr Yim, the resident psychiatrist that since the accident, apart from physical problems, she had been afraid of going out and her mood had worsened with decreased appetite and fleeting suicidal idea. She had follow-up consultations. In one of such consultations on 25 May 2011, she mentioned about seeing followers in the street. Such followers were insurance agents. She also reported seeing ghosts at night. She last attended consultation on 13 July 2011 and she was seen to be irritable with fleeting suicidal ideas. She reported further that she heard voices chatting with each other for the past two years.

32. On 2 September 2010, Chu visited Dr Wong, a clinical psychologist of AHMLNH. She complained about her inability to accept the fact that her injury interfered with her normal daily activities and caused her urination problem. She attended follow-up sessions in January 2011 and June 2011.

33. Lastly, Chu produced sick leave certificates showing that she was granted sick leave by the Department of Orthopaedics & Traumatology of PWH up till 4 July 2013 for her low back pain injury.

34. For the purpose of this action, Chu took part in a joint medical examination by Dr Lau and Dr Lee on 9 December 2011. In their joint medical report dated 16 January 2012, the following matters are of particular relevance.

35. Chu complained to the doctors about her back pain over the sacral area, which was persistent and exacerbated when walking for more than an hour. She also complained about her back pain after lying supine for more than an hour. She was found to be independent in her daily living activities. She told the doctors that since the death of her husband, she lost her mood in carrying out her household chores.

36. General examination showed that the general condition of Chu was satisfactory and the only problem she had was that she could only squat half-way down because of her back pain. She could stand with a normal posture and there was no listing (lateral deviation) of the spine. There was no muscle guarding or muscle spasm in her back. There was local tenderness at the midline of the back from S1 to S4 levels. There was no muscle easting in the lower limbs and the muscle power and sensation of the lower limbs were normal.

37. Both doctors have come to the following conclusions. Chu sustained contusion injury of her back. There was no bony or neurological damage. The disc desiccation and small prolapse revealed in MRI were common in degenerative spines and they were not pathonomonic of spinal trauma. MRI scans showed no nerve compression. Both doctors found that the present symptoms were unrelated to the sarcoma and the present symptoms in her back were all attributable to the accident.

38. Further, Dr Lau found Chu’s complaint of back pain to be genuine and he opined that Chu suffers from residual back pain. Dr Lee opined that the absence of muscle spasm suggested any possible residual back pain should only be mild.

39. For employment, Dr Lau opined that Chu should be able to resume to her pre-accident job as a shop assistant. However, due to her residual back pain on exertion, Dr Lau was of the view that Chu has to lift with due care of her posture. Reduced efficiency was expected too.

40. Dr Lee agreed that Chu has to paid attention to posture when lifting weights and this may slightly impair her work efficiency. However, extra occasional rest due to her back pain was not expected.

41. For sick leave, Dr Lau opined that Chu should be given sick leave while she was receiving active treatment. Since Chu was reported to attend physiotherapy training on 17 February 2009, Dr Lau opined that ten months of sick leave were appropriate.

42. Dr Lee was of the view that contusion injury without changes related to trauma took about six months to subside and it should be the appropriate length of sick leave.

43. In regard to permanent disability, Dr Lau’s assessment was 3% of the whole person and Dr Lee’s assessment was 1%, pointing out that the residual back pain should be mild in nature.

44. Both doctors opined that the orthopaedic condition of Chu is unlikely to change in the near future and no further deterioration is expected. Moreover, there is no need for her to receive regular treatment.

*Analysis*

45. Chu appeared to me to be a witness prone to exaggeration. Chu was argumentative and she talked back without hesitation. She was quick-thinking and could provide exact dates and numbers in her oral testimony.

46. Her residual back pain is not controversial. I accept the medical evidence of Dr Lau and Dr Lee that it is only mild in nature and no further medical treatment is necessary. It was telling evidence that Chu attributed her inability to resume work to a nuclear scan she underwent on 14 February 2011 whilst she characterized her back pain to be, in her own words, only a petty matter (尾龍骨好少意思啫, 冇乜大不了). Chu said that her body was full of tumors two months after the nuclear scan and she could hardly sit for a long time. I should note that my observation of her in the witness box is that she could sit quite comfortably throughout, nevertheless.

47. Her major complaint about her back problem is her prolapse of L5/S1. However, in the light of the medical evidence of Dr Lau and Dr Lee, I accept that the prolapse is only common in degenerative spines including Chu’s and it has nothing to do with the accident. I also find that Chu’s evidence relating to her prolapse of L5/S1 was exaggerated.

48. I could not find any casual link between the alleged urological and psychiatric problems of Chu and the accident in the absence of medical evidence. I am not prepared to accept Chu’s allegation of her psychiatric problems too. I have doubts about her assertions of her hallucinations including her being harassed and followed by strangers. I am not persuaded that she genuinely thinks that she has such hallucinations.

49. Miss Loh helpfully referred to me a number of authorities on the award of damages for PSLA. They included *Wong Kin Hung v Chan Wai Ming*, unreported, DCPI 1223/2006, 16.2.2007, *Ng Ting Chun v Chung Man Chun, Philip*, unreported, DCPI 1070/2007, 19.6.2007, *Wong Chi Wing v Leung Wing Keung*, unreported, DCPI 1367/2007, 15.8.2008, *Li Ting Fai v Woo Chi Keung*, unreported, DCPI 807/2007, 18.1.2008, *Yip Piu v Chung Kam Fei Catherine and Anor.*, unreported, HCPI 1168/1999, 27.11.2000, *Ahmed Masood v Chung Kau Engineering Company Limited*, unreported, DCPI 517/2003, 28.1.2005, *Chiu Wing Sze v Chan Ying Wai & Anor.* [2001] 2 HKLRD 92, *Shek Kam Ching v Po Kee Construction Engineering Ltd & Ors.* [2002] 3 HKLRD 795, *Siu Siu King v Wong Chak Wing*, unreported, HCPI479/2003, 14.11.2008 and *Chan Chung Keung v Greenroll Limited trading as Conrad Hong Kong*, unreported, HCPI 275/2005, 20.12.2005.

50. After reviewing the foregoing authorities, bearing in mind that Chu is currently 53 years old and accepting Dr Lau’s assessment that Chu suffers from a permanent impairment of 3% of the whole person, I agree with Miss Loh’s submission that the award of PSLA in the present case should be **HK$100,000**.

51. I turn to consider Chu’s claim for loss of earnings. I accept the evidence of Dr Lau and Dr Lee that Chu could return to her pre-accident work though according to the former her work efficiency may be reduced. I accept that the appropriate sick leave period for her back pain should be ten months at most despite the sick leave certificates Chu managed to obtain. In the premises, I award pre-trial loss of earnings (including MPF benefits) in the sum of **HK$26,082** (HK$2,484 x 10 months x 1.05).

52. On the evidence, I believe the residual pain and discomfort of her back pain alone would not prevent Chu from returning to her pre-accident employment. It is clear on her own evidence that she has not resumed working for some other problems unrelated to the accident. I hence make no award for future loss of earnings.

53. I accept the opinion of Dr Lau and Dr Lee that Chu’s working efficiency would be slightly reduced by her back pain. I take into account Chu’s age and the fact that Chu has a lot of other complaints about her physical conditions rendering her unable to return to work and for her limitations arising from her mild back pain in the labour market, I would award **HK$10,000** as damages for loss of earning capacity.

54. For miscellaneous expenses including medical expenses, travelling expenses and costs of tonic, the defendants offer a round figure of HK$10,000 as special damages.

55. I have perused the documentary evidence adduced by Chu in support of her claim for such expenses. I am not persuaded that Chu has actually incurred the amounts as claimed. The documents were incomplete and in any event the medical expenses incurred were very small, given the fact that Chu has got a waiver because of her unemployment.

56. For tonic food, it is noteworthy that Chu first burst out that she neither bought nor consumed any tonic food. When she was reminded of her claim of HK$10,000 under this head, she made up a story which I have no hesitation to reject.

57. In the premises, I find the defendants’ offer to be generous already and I award **HK$10,000** as special damages.

58. I accept the evidence of Dr Lau and Dr Lee and I do not that Chu needs further medical treatment for her back pain. I refuse to make any award for future medical expenses or future travelling expenses.

59. I award interest on damages for PSLA at 2% per annum from the date of service of the writ herein until the date of this judgmemt and interest on pre-trial loss and expenses from the date of the accident up to the date of payment of employees’ compensation, at 4% per annum. I was told that Chu received employees’ compensation in the total sum of HK$114,864.50 on 9 July 2010.

60. I further make a costs order *nisi* that the defendants should pay the costs of this action to Chu to be taxed if not agreed.

61. Interpretation service in respect of this judgment can be provided to Chu if she requires the same.

62. Miss Loh conducted this trial with commendable patience and skill. I thank her for her assistance.

(Kent Yee)

District Judge

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The Plaintiff appeared in person

Miss Phillis Loh, instructed by Messrs Mayer Brown JSM for the Defendants