#### DCPI586/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 586 OF 2007

BETWEEN

MOHAMMED ASHAQ Plaintiff

and

ROYAL HONOUR INDUSTRIAL LIMITED Defendant

##### Before: Her Honour Judge H C Wong in Court

Dates of Hearing: 26 and 27 November 2007

Date of Delivery of Judgment: 27 November 2007

## J U D G M E N T

1. The plaintiff was an employee of the defendant, working as a forklift driver. On 12 November 2005, on or at around 7 pm on that day, he was working in the course of employment, loading bales of clothing into a container at a gas generator forklift car. He was injured when the gas cylinder of the forklift car broke loose and hit the back of the driver’s seat, which in turn hit his back, causing him to fall onto the ground.
2. The defendant no longer disputes liability at the hearing. The issue remaining is, therefore, quantum.

The Plaintiff’s Injuries

1. The plaintiff was admitted into the Orthopaedics and Traumatology Department of the Yan Chai Hospital after the accident. He complained of left shoulder and back pain. The doctors found tenderness over the posterior aspect of the left shoulder and low back. He was treated with analgesic and physiotherapy. He was discharged home on 16 November 2005.
2. The plaintiff attended the Outpatient Clinic of the Yan Chai Hospital and continued with physiotherapy treatments in the next four to five months. The plaintiff claimed he still had residual shoulder and back pain, which he would experience when bending down, and that he could not do heavy manual duties after the accident.

Joint Medical Expert Opinion

1. The plaintiff was jointly examined by Orthopaedics Drs. Wong Kwok-shing, Patrick and Chun Siu-yeung on 7 November 2006. In the two doctors’ joint report of 7 December 2006, they agreed that the plaintiff had sustained low back and left shoulder contusion injuries involving soft tissues. They confirmed the injuries were compatible with the mechanism of injury described by the plaintiff.
2. At the joint medical examination, the plaintiff complained to the two doctors of his low back intermittent pain when bending and twisting, turning in bed and carrying heavy objects of over 5 kilograms for 5 to 10 minutes. He further complained of back pain if he walked without a cane. He rated the pain severity when asked by the two doctors at 7/10. He also complained of intermittent shoulder pain with movement or change of weather to the two doctors. He told the doctors he would not walk without a cane. He claimed he could not squat or stand on tiptoes or heels.
3. He was observed at the examination to be walking with a slight right limp. However, in paragraph 50 of the joint medical report, he was observed by Dr Chun by co-incidence prior to the joint examination at the Mongkok MTR Station to be acting normally and swinging his walking stick ‘like a hockey stick’ while talking to his friends, smiling happily. On the other hand, when he walked into Dr Wong’s consultation room for the joint examination, he was seen using a walking stick and limping.
4. The two doctors were shown a surveillance tape of the plaintiff taken on the mornings of 10 to 12 July 2006. Dr Chun observed at paragraph 54 of his report, that in the tape the plaintiff was shown walking in an normal gait. The walking stick he was carrying was not used for support, it was noticeably off the ground. His left shoulder was swaying naturally while he walked in a normal pace, smoking a cigarette. He was further observed to have rotated his trunk, looking to the left, with his left shoulder smooth and normal. Then he was also seen walking down a slope naturally, lifting the trunk cover of a friend’s car, bending his left shoulder and his back in a natural manner. He further used his left hand to open the car door. Both Dr Chun and Dr Wong agreed that no abnormality was noted in his back or his shoulder, or in his walking gait in the three days of the surveillance.
5. The two doctors agree that the contusion injury sustained by the plaintiff at the low back and left shoulder involved soft tissues only. They concluded that the complaints of the plaintiff of residual low back and shoulder pain with severe limitation of function, such as relying on the stick to walk and inability to carry weight with his left hand were unsupported by physical examination at the joint examination, or by X-rays taken at examination. Therefore, the plaintiff’s claimed symptoms were likely to be exaggerated.
6. Dr Wong concluded the plaintiff may have mild residual low back pain and left shoulder pain with mild reduced movement as a result of the contusion injuries. He does not expect any gross dysfunctions from the plaintiff, such as walking with a stick or inability to use his left hand. He assessed the plaintiff to have suffered 2% impairment of the whole person due to the residual pain and loss of earning capacity.
7. Dr Chun, on the other hand, concluded the plaintiff had no need to use a stick to walk, exaggerated his symptoms at the joint examination and he considered the plaintiff a malingerer. He concluded the plaintiff suffered no loss of earning capacity.
8. Both doctors considered the plaintiff should be able to return to work as a forklift driver. In Dr Wong’s opinion, the plaintiff may have mild reduction in work efficiency, while Dr Chun considered he should have no restrictions in his work at all.

Pain, Suffering and Loss of Amenities (PSLA)

1. The plaintiff asked for $150,000 under this head, while the defendant’s counsel, Mr Cheung, proposed an amount of not more than $50,000. The plaintiff admitted in court that his condition has much improved since the joint medical examination one year ago. From my observations in court, he no longer needed a walking stick to walk, however, he still complained in court of feeling pain when he bent down, and that he could not carry heavy weight for long durations.
2. In paragraph 59 of the joint medical report, the plaintiff is expected to have good prognosis for his contusion injuries. The two doctors could not find any organic lesion identifiable to explain his residual symptoms and disproportional disabilities. In Dr Wong’s opinion, the plaintiff may have mild residual low back and left shoulder pain with reduced movement as a result of the contusion injuries. Dr Chun, however, believed the plaintiff had grossly exaggerated his symptoms and disability during the examination. His opinion was based on the video surveillance tape shown to him.
3. From the plaintiff’s manner and behaviour exhibited in the video, the plaintiff clearly walked with a sprightly gait, and there was no sign of any pain. In spite of the rather long distances he had covered in the surveillance tapes on 9 to 11 July 2006, there was no sign of any tightness or pain shown on the tape. Mr Rehman, counsel for the plaintiff, claimed that the plaintiff had, at a certain stage, seen to have put his left hand over the left side of his rib while standing next to the railings. Mr Rehman said that was indicative of shoulder or back pain.
4. After viewing the videotape, I cannot agree the gesture referred to by Mr Rehman could be interpreted as an indication of shoulder or back pain, the part of the body the plaintiff touched was neither his left shoulder or his low back. On the contrary, this gesture demonstrated he could bend his left arm to touch the left upper side of his ribs comfortably.
5. Based on the medical notes and report of the Yan Chai Hospital, the two orthopaedic surgeons and the physiotherapists, the plaintiff was discharged sometime between May and July 2006. This indicated they clearly regarded the plaintiff had recovered from his injuries at the time. In fact, the orthopaedic surgeon at Yan Chai Hospital had recorded “MMI” - maximum medical improvement.
6. In the joint medical report, Dr Wong and Dr Chun reached a similar conclusion. In fact, Dr Chun called him a malingerer who had grossly exaggerated his symptoms at the joint examination. The videotape clearly showed the plaintiff to have fully recovered. Based on such evidence and the joint medical report, the plaintiff’s case is clearly in a different category from the victims in the cases referred to me by Mr Rehman where the victims there sustained much more serious injuries.
7. In the case of *Wu Wai Kuen v Li Siu Keung T/A Alex’s Kitchen* DCPI309/2001, where the victim sustained a fracture to her sacrum, in the case of *Yeung Sze v Win Art Design & Decoration Company Limited* HCPI6/2000, where the victim suffered from about 20% permanent disability of the whole person, in the case of *Lee Yuk Lan v Royaltelle International Limited* HCPI1871/2005, the victim had a pre-existing scoliosis of the thoracic spine, which caused the recovery of the low back injury to be prolonged.
8. I find the cases referred to me by Mr Cheung, counsel for the defendant, to have more relevance to the plaintiff in the present case. In the case of *Wong Kin Hung v Chan Wai Ming* DCPI1223/2006, the victim suffered from intermittent residual neck pain. He was an interior decorator who was often required by his job to paint ceilings, his work performance had therefore been affected by the injury. Deputy Judge Wahab awarded the sum of $70,000 under this head. In the case of *Tam Fu Yip Fip v Sincere Engineering & Trading Company Limited* HCPI473/2006, Mr  Justice Shaw awarded $75,000 to the victim who had a pre-existing degenerative back disorder suffering a soft tissue injury to the back due to the accident. Shaw J awarded $25,000 to the plaintiff whom he found had suffered a minor injury to his back and who had two subsequent injuries which aggravated his back pain. In the case of *Ma Shak Yau v Chan Wai Man & Anor* CPI2318/2006, my brother Judge Au awarded $80,000 under PSLA to the victim, whose pain and disability to the back was increased by 20% due to the accident.
9. I find the plaintiff had suffered a soft tissue injury on his left shoulder and back. Due to his young age of 23 at the time of the accident, he had no pre-existing condition on his back or shoulder, and he was able to recover well. In fact, the doctors and physiotherapists at Yan Chai Hospital recorded his recovery as early as May 2006. The video surveillance tape of July further indicated the extent of his recovery. In view of Dr Chun’s assessment that he no longer suffered from any permanent disability, I find he suffered, if any, little or minor permanent disability.
10. I believe he exaggerated his symptoms to the doctors and he is a malingerer in spite of the MAB assessment on 24 August 2006 that he suffered from 2% loss of earning capacity. From the surveillance tape, I do not accept he suffered from 2% loss of earning capacity. The MAB had obviously based its assessment on the Yan Chai Hospital records and what the plaintiff told them at the interview. They did not have the benefit of viewing the surveillance videotape.
11. Furthermore, the plaintiff failed to disclose to the court, in his evidence in court, or in his witness statement that his hobby was playing cricket. In fact, he told the two doctors at the joint medical interview that he had no hobbies.
12. Having considered all the evidence before me, I find the award under PSLA of $50,000 to be appropriate.

Loss of Pre-Trial Earnings

1. It has been agreed that the plaintiff’s salary was $8,600 per month while he was employed by the defendant as a forklift driver. He was granted sick leave from the day of the accident, 12 November 2005, to 24 August 2006. I am not going to disturb the MAB-approved sick leave period, though the Yan Chai Hospital doctors clearly gave him sick leave up to the date of the medical assessment board interview of 24 August 2006. I would allow the award of loss of income during this sick leave period of 9.4 months at $8,600. Therefore, the award of loss of pre-trial earnings during the sick leave period is: $(8,600 x 9.4) x 1.05 (MPF). The total comes to $80,840.
2. Since after the sick leave period to date, the plaintiff claimed he had been unable to find any form of employment. I find that to be rather incredible for a young man of 25 years. I also find it surprising that he did not seek retraining during this period. He claimed he had been looking for light duty jobs such as working as a security guard or a cleaner, but due to the lack of knowledge of Chinese or English he had not been successful. However, he failed to produce any proof of job applications or rejections.
3. I am not impressed by his inertia and his attitude to job hunting. He should be able to return to his pre-accident job as a forklift driver after the sick leave period or acquire the skill of a driver if he put his mind to it. The claim of his not being able to sit for long hours was never disclosed to the doctors at Wan Chai Hospital or to the two medical experts. Indeed, he did not disclose this in his witness statement or mentioned in his evidence in court. I do not believe it was a genuine complaint.
4. For the reasons set out above, I do not find the plaintiff entitled to the loss of future earnings or a loss of earning capacity, because at the age of 25, he should easily take up some form of employment; and, he should be able to return to his pre-injury employment a year ago.

Special Damages

1. Medical and travelling expenses have been agreed at $1,300, and I so allow.

Summary

PSLA $ 50,000

Loss of pre-trial earnings

(including sick leave) $ 80,840

Medical and travelling expenses: $ 1,300

$132,140

Less: ECC payment $ 84,820

Total $ 47,320

Interest

1. Interests under PSLA at 2% per annum from the date of writ to the date of judgment, thereafter at judgment rate until full payment.

Costs

1. Cost to the plaintiff to be taxed, if not agreed, with certificate for counsel.

(Discussion re costs)

1. As the plaintiff failed to beat the payment in, costs incurred by the defendant after the payment in date should be to the defendant.

(Discussion re order for costs and release of money)

1. On the undertaking that the plaintiff’s solicitor will not distribute the awarded sum to the plaintiff until after the costs between the parties have been settled, the plaintiff’s solicitor be allowed to obtain the awarded sum from the payment into court. The balance to be returned to the defendant with interest accrued.

(Discussion re payment balance payment)

# (H C Wong)

# District Court Judge

Mr Ubaid-Ur Rehman, instructed by Messrs Jal N Karbhari & Co, for the Plaintiff

Mr Kam Cheung, instructed by Messrs Winnie Leung & Co, for the Defendant