## DCPI 594/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 594 OF 2008

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| --- | --- | --- |
| BETWEEN | LUI KIN WAI | Plaintiff |
|  | and |  |
|  | ACTIVE ENGINEERING LIMITED | 1st Defendant |
|  | LUI TSUN LUNG and LUI MAN TO  trading as  YUEN HING ENGINEERING COMPANY | 2nd Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 6 - 8 October 2009

Date of handing down Judgment : 12 November 2009

# JUDGMENT

**Background**

1. It is not in dispute that Mr. Lui, the Plaintiff, met with an unfortunate accident in the course of his work at On Ho Industrial Building in Shatin ("**Site**") on 4 March 2006. He fell from a height, and fractured his right wrist and right pelvis as a result. Mr. Lui was employed by the 1st Defendant ("**Active**") at the material time as a structural investigator. Active was a subcontractor of the 2nd Defendant ("**Yuen Hing**"), which was the principal contractor conducting structural and renovation works at the Site.
2. Mr. Lui claims that at the material time, he was working on the top of a platform which he had been instructed to erect in the carpark at the Site, to check for cracks and spalling on the ceiling which was over 20 feet from the ground level. He claims that the platform was about 6 m in height, and that as he was about to climb down from the platform, it toppled to its left and he fell to the ground, with his right hand taking the full force of the fall. He claims that the accident had occurred as a result of the breach of contractual, statutory and common-law duties of care on the part of Active and Yuen Hing, in failing to provide a safe system and place of work, failing to supervise his work and failing to give instructions, training and equipment in the erection of the platform which was unsafe, defective and dangerous for his work.
3. The dispute centres on whether Mr. Lui had fallen in the manner he claimed. Active and Yuen Hing deny that Mr. Lui was working on the platform in the carpark at the material time. They claim that he was instead working in the staircase in the building at the Site, and was in the course of inspecting the ceiling of the staircase when he fell from a flight of steps leading from the third floor to the second floor. They rely on his own report of the accident made to Yuen Hing.

**The Issues**

1. The issues for determination at trial are:
   1. whether Mr. Lui had met with the accident and fallen from the 6 m platform, as he claims;
   2. if yes, whether the accident was caused by the breach of duty on the part of Active and Yuen Hing; and
   3. the damages to which Mr. Lui is entitled.

**Whether Mr. Lui had met with the accident and fallen from the 6 m platform**

1. According to the evidence of Mr. Lui, he had been carrying out structural investigating work for over 10 years. Since February 2006, he had been employed by Active, but it is not in dispute that before that, he had been working with Mr. Leung Kok She (“**Mr. Leung**”) of Active for many years when they were employed by another company, Stanger Asia, which was also engaged in structural investigative works.
2. Active was the contractor responsible for concrete reinforcement and inspection work at the Site. Mr. Lui's duties included checking and inspecting concrete structures at the Site, including ceilings, walls and pillars, for defects such as cracks and /or spalling, and to take photographs of the defects discovered.
3. On 4 March 2006, Mr. Lui was working with two other co-workers, Chan and Yeung. According to Mr. Lui, they had arrived at the Site at 8:30 am, and had reported to Yuen Hing's supervisor on site, one Mr. Hung. Mr. Lui's evidence is that they were instructed by Mr. Hung to inspect the structure of the ceiling in the carpark. The carpark ceiling was approximately 7 m to 8 m high. According to Mr. Lui, Mr. Hung provided the workers with the frames and tools to erect a platform, from which they were to carry out their work concerning the ceiling. Mr. Lui claims that he had never before erected a platform as high as that required for the work on the ceiling in the carpark. He also claims that he, Chan and Yeung did not have the necessary licence to erect the platform, but that they proceeded to do the work, as instructed. The platform was completed at around 10 am. It had 3 levels, each level measuring 2 m, with a total height of over 6 m. Mr. Lui claims that the platform did not have any guard or rails at the top.
4. According to Mr. Lui, he, Chan and Yeung took turns standing at the top of the platform to carry out inspection work of the ceiling of the carpark. At approximately 3 pm, Mr. Lui was standing at the top of the platform, with Chan and Yeung holding onto the platform on ground level. As Mr. Lui was about to climb down from the platform, the platform toppled, and Mr. Lui said he fell from a height of approximately 6 m to the ground. Chan and Yeung came to his assistance, and took Mr. Lui to the hospital by taxi. He was given treatment at the Accident and Emergency Department ("**Department**") of the Prince of Wales Hospital ("**PWH**").
5. Only Mr. Lui gave evidence as to the circumstances of the accident. As his evidence on the accident is challenged by Active and Yuen Hing, it is important to have regard to any independent and objective evidence as is available with regard to any contemporaneous account which was given of the accident.
6. According to the medical report given by PWH, Mr. Lui arrived at the Department at 3:24 pm on 4 March 2006 for injuries allegedly sustained when he "slipped and fell while walking on stairs". The notes made by the staff at the Department at 3:30 pm record "S/F from stairs, Rt wrist deformity". Mr. Lui’s conscious level was stated to be alert. The notes made by the treating doctor also record "S&F (slip and fall) on R. OSH (right out-stretched hand) while walking on stairs"; and "R. wrist deformity and pain".
7. Mr. Lui claims that he had not given any account of his fall to the medical staff at PWH. He claims that the information recorded in the attendance records and notes should have been furnished by either Chan, or Yeung, who had accompanied him to the Hospital, or by Mr. Leung, who had by then arrived at the Hospital, having been informed of the accident by Chan. Mr. Lui relies on the fact that Mr. Leung's name and mobile phone number appeared in the particulars recorded in the Nursing Record dated 4 March 2006, at 4:36 pm. Mr. Leung admits that he was at PWH after the accident. He denies any role in providing information of the accident to the medical staff.
8. Mr. Lui denies that he had informed the medical staff at the Hospital that he had slipped and fallen from the stairs, as he claims that he had lost full consciousness as a result of the pain sustained after the fall. He claims also that he was feeling dizzy, and that he had no recollection as to how he had arrived at the Department. According to Mr. Lui, his only recollection was being awakened by a doctor, who informed him that his right hand had been fractured, and that he had fainted after this.
9. Counsel for the Defendants was quick to point out that Mr. Lui's claim of having no full consciousness upon arrival at the Hospital is inconsistent with the attendance record of the Department, which states that he was alert at 4:30 pm. The Nursing Record to which Mr. Lui refers also states that at 5 pm, Mr. Lui's conscious level was "alert", his mental state was "orientated", and his self-care ability was "Self Help". The Nursing Record reflects Mr. Lui's chief complaint or brief history as "S/F (slip and fall) from about 10 steps stairs, landed on R hand".
10. As recorded in the Progress Sheet, at 5:25 pm, Mr. Lui had been given medication for his pain and he was apparently being prepared for surgery to treat the distal radius fracture. The notes record the information that food had last been consumed by Mr. Lui at 10am, and drink at 5 pm. It is unlikely that anyone other than the patient treated would have been in a position to furnish such information to the medical staff at the material time.
11. From the contemporaneous medical records, I conclude that Mr. Lui was conscious and alert at the time when the medical staff at the Department were informed that he had slipped and fallen from the stairs. From all the circumstances, including the fact that specific details had been given (namely, that he had fallen from "10 steps"), I consider it more likely than not that such information had been given by Mr. Lui himself. I also consider it to be unlikely that Mr. Lui would withhold from the treating doctors and nurses the important fact that he had fallen from a height of 6 m. If that was indeed the case, such information would be vital to the treating doctors and nurses, to ensure that a full examination would be conducted on Mr. Lui to check for any further and possibly hidden injuries that he might have sustained as a result of the fall.
12. Mr. Leung claims that Mr. Lui was not working in the carpark, but in the staircase, when the accident occurred. According to Mr. Leung, Chan telephoned him in the afternoon of 4 March 2006 to inform him that Mr. Lui had fallen from the staircase, where he was doing inspection work of the ceiling of the staircase. According to what Chan had informed Mr. Leung, neither Chan nor Yeung was present at the time of the accident. Mr. Leung filed a report of the accident to Yuen Hing on 7 March 2006, on the basis of what Chan and Mr. Lui later told him.
13. Mr. Leung claims that in any event, it was not necessary for Mr. Lui to carry out any work on the platform in order to inspect the ceiling of the carpark. He claims that the inspection and marking of defects found on concrete structures was normally done by the labourers, whereas Mr. Lui was employed as a foreman. Mr. Lui denies that he was a foreman. Mr. Leung claims that Mr. Lui was primarily responsible for making records of any defects discovered, and taking photographs thereof. Even if Mr. Lui was carrying out inspection work of the ceiling of the carpark on the day in question (which Mr. Leung denies), Mr. Leung claims that it was sufficient for Mr. Lui to carry out visual inspection and to take photographs of any defective areas. According to Mr. Leung, it was unnecessary and inappropriate for Mr. Lui to use the hammer to hit the ceiling of the carpark, as he claims, or to stand on the platform to do such work.
14. On 12 March 2006, Yuen Hing arranged for its safety officer, Ken, to interview Mr. Lui and to compile an accident investigation record ("**Statement"**). Mr. Leung was present to witness the interview. The alleged Statement from Mr. Lui to Ken comprises a series of written questions and answers. According to the Statement compiled by Ken, Mr. Lui was inspecting the ceiling and taking photographs, when he "stepped on air" ("腳踏空"), lost his balance, and fell from the staircase leading from the third floor to the second floor. He had to call his colleagues to go to the scene of the accident to help him, and to take him to PWH. According to the Statement, Mr. Lui felt a little dizzy after the fall, but was able to make the phone call to his colleagues.
15. Mr. Lui denies that he had given the answers as recorded in the Statement. He claims that on 5 March 2006, Chan, Yeung and Mr. Leung went to see him at PWH. Mr. Lui asked Chan why the platform had fallen, and was told that one of the wheels at the base of the platform had broken. According to Mr. Lui's evidence, Mr. Leung informed him that there would be a lot of trouble if was stated that Mr. Lui had fallen as a result of the collapse of the platform, and he was persuaded by Mr. Leung to report that he had fallen down the staircase. Mr. Leung informed Mr. Lui that if he did as he was told, Active would pay to Mr. Lui 4/5 of his wages. Mr. Lui claims that he agreed to do as he was told by Mr. Leung, as he did not fully appreciate the seriousness of his injuries. According to Mr. Lui, Mr. Leung was present when Ken asked to see him on 13 March 2006. He claims that it was on their persuasion, and for the purpose of keeping his job at Active, that he put his signature to the Statement, which in fact consisted of answers written out by Ken on his own accord. He claims he had never worked in the staircase on the day in question.
16. Mr. Lui originally claimed that the answers given in the Statement were all made up by Ken. In the course of cross-examination, he accepted however that he had himself supplied the answers to 7 of the 13 questions, and 2 of the 7 additional supplementary questions. These do not relate to the work on either the platform, or in the staircase.
17. On Mr. Lui's case, it was only when he applied for legal aid for the purpose of commencing employees’ compensation proceedings in July 2007 that he finally gave the true account of the circumstances leading to his accident.
18. As plaintiff, the onus is on Mr. Lui to prove his case on a balance of probabilities. Where, at the end of the day, a plaintiff leaves the case on even scales and does not satisfy the court that its loss is attributable to the fault of the other party, or if the court is left in doubt, the plaintiff fails to discharge its burden of proof, and cannot succeed (see, for example, *So Fat v. Ken On Concrete Co. Ltd*. unreported, CACV 193/1991, 17 July 1992).
19. I am not impressed by the evidence of either Mr. Leung, or Mr. Lui, in this case. I do not consider that either of them was forthcoming in giving a full account of the circumstances of the accident and its aftermath, including the investigations made by Active and Yuen Hing into the accident. Mr. Leung gave inconsistent answers in relation to the information which had been given to him for the purpose of his preparation of his report of the accident to Yuen Hing, and on which he allegedly relied in compiling his report.
20. On the other hand, I consider that Mr. Lui had exaggerated his claims in relation to his condition immediately after the accident and upon his arrival at the Hospital, in an attempt to distance himself from the information recorded in the hospital notes and which clearly supports a report of a slip and fall from the staircase. The claim that Chan had informed the medical staff of the fall from the staircase upon Mr. Leung’s instructions, when Chan had called Mr. Leung in the taxi on the way to the Hospital, was purely Mr. Lui's surmise and bare assertion. Chan was never called as a witness, by either Mr. Leung, or the Defendants. It is claimed that they have all lost contact with Chan and Yeung.
21. Even on Mr. Lui's evidence, he had given an untrue account of the accident to Yuen Hing, and had been prepared to maintain the untrue story until he realized, some 16 months after the accident, that the treatment of his injuries was more complicated than he had initially thought. When he allegedly gave the "true" account of the accident upon filing the Application in DCEC 955 of 2007 ("**Application**") for recovery of employees’ compensation, there were still inconsistent accounts and contradictory claims in relation to the injuries he had sustained as a result of the accident. If Mr. Lui had at any time given a truthful account of the facts as they had actually occurred, one would envisage such account to be consistent and the same, irrespective of the purpose for which the account was made. Quite to the contrary, the accounts pleaded in the Application and in the Statement of Claim filed in these proceedings, prepared by the same solicitors acting for Mr. Lui, contain discrepancies which cannot be totally ignored, or simply brushed aside. Mr. Lui claims in the Application that he was not provided with a ladder to climb up and down the platform which he had erected, and that he had to climb with his hands - none of which is mentioned in these proceedings, when they would support his case of negligence against Active and Yuen Hing. Nor is the fact of the alleged broken wheel at the platform ever mentioned in either the Application or the Statement of Claim in these proceedings. I am not convinced that Mr. Lui’s evidence can be trusted.
22. I am not satisfied, on a balance of probabilities, that the Statement and the account given to the medical staff in the Hospital was **not** the true and honest account of the accident, as Mr. Lui claims. The Statement, Mr. Leung's report dated 7 March 2006, and Form 2 signed by Yuen Hing in reliance on the Statement and Mr. Leung 's report all refer to Mr. Lui taking photographs at the material time, whether in the staircase just before the fall, or (according to Mr. Leung 's report) in the building. If these accounts are all false, as Mr. Lui maintains, he and his solicitors could easily have applied for specific discovery of the photographs claimed to have been taken. There is no evidence of this having taken place, and of course, no photographs were produced by either party at trial. I may infer from this that Mr. Lui knew that any photographs discoverable on his request would not assist his case as to the venue of the accident where the fall had allegedly taken place.
23. The medical experts engaged by the parties agree that the injuries sustained by Mr. Lui, namely, fracture of the right distal radius, fracture of the right pubic ramus and superficial abrasion of the right cheek, are all consistent with a fall from a height. Dr. Tio accepted that it was more likely that Mr. Lui had sustained a fall from the 10 to 15 steps of the staircase, as documented in the medical records of PWH, but pointed out that falling from 6 m and falling from 10 to 15 steps could produce the same fracture in the wrist, with the severity described for Mr. Lui. Dr. Chun made it clear that falling from a platform of 6 m would produce in a person more serious injuries in addition to the wrist injury, such as a more serious head injury, or other fractures in the upper limb, or fractures of the heel bones if landing on the hand and feet at the same time.
24. In summary, whilst I have every sympathy for Mr. Lui in respect of his injuries, cases cannot be decided on sympathy alone and I regret that on all the available evidence, I am not satisfied that Mr. Lui had sustained injuries in the manner he asserts and so as to give rise to any claim of negligence on the part of either Active or Yuen Hing. I agree with Counsel for the Defendants that the case of *Poon Hau Kei v. Hsin Chong Construction Company Ltd.* [2004] 2 HKC 235 does not apply in this case, because even if it is open to the court to decide on the basis of a scenario pleaded in the Defence, namely, that Mr. Lui had fallen from the staircase, such a scenario does not establish any negligence on the part of either Active or Yuen Hing as being the cause of Mr. Lui's injuries. I do not consider that it is reasonably practicable for either Active or Yuen Hing to take any precaution to guard against an employee taking a false step in the course of his looking up at the ceiling, or not paying due attention, when walking down or otherwise working in the staircase. If the accident had occurred in the manner described in the Statement, then it was caused as a result of Mr. Lui's own lack of care.

**The damages to which Mr. Lui is entitled**

1. The second and third issues I have identified do not arise for determination, in the light of my findings on the first issue. However, in case I am wrong on the question of liability, I will very quickly deal with the issue of the quantum of damages.
2. It appears from the medical evidence that despite the initial complication associated with the distal radius malunion, which called for corrective osteotomy and wrist arthroscopy, the condition of Mr. Lui's right wrist has greatly recovered. His hip fracture was not serious. In December 2008, he was measured as having right hand grip strength of up to 22 kgs. The experts agree that Mr. Lui's complaint of right shoulder pain is not related to the accident. I consider that an appropriate award for pain, suffering and loss of amenities is $250,000.
3. There is no dispute regarding Mr. Lui's pre-accident earnings of $9,500. He was given sick leave for a total of 1,033 days, up to 8 January 2009. Mr. Lui had worked as a delivery worker for 3 months during June and August 2008, with monthly earnings of $8,900. He resigned as a result of the pain sustained from lifting heavy objects in the course of the work. Since December 2008, Mr. Lui has been working as a security officer with a monthly salary of $6,500. On the evidence, I would have awarded him the sum of $335,640 claimed under pre-trial loss of earnings.
4. Mr. Lui was 43 years old at the time of the accident and 47 at the time of trial. I would have allowed his claim for future loss of earnings, adopting a multiplier of 11, giving a figure of $360,360.
5. I am not satisfied on the evidence that there is a substantial or real risk that Mr. Lui will lose his job as a security worker. I am not prepared to make any award for loss of earning capacity.
6. Mr. Lui 's claim for special damages has been agreed at $8,000.
7. The total award for Mr. Lui, if he had succeeded on the issue of liability, is:

PSLA $250,000

Pre-trial loss of earnings $335,640

Future loss of earnings $360,360

Special damages $ 8,000

$954,000

Less: Employees' Compensation $213,043

$740,957

**Conclusion**

1. As Mr. Lui has failed to discharge his burden of proof, I dismiss the action with an order nisi that the costs of the action are to be paid by Mr. Lui to Active and Yuen Hing, with Certificate for Counsel, to be taxed if not agreed. Mr. Lui 's own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Miss Rebecca M.K. Lee, instructed by Messrs. Rita Law & Co. (assigned by D.L.A.), for the Plaintiff*

*Mr. John Wright, instructed by Messrs. Winnie Leung & Co., for the 1st and 2nd Defendants*