## DCPI 730/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 730 OF 2009

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##### BETWEEN

HO MAN WA （何文華） Plaintiff

### and

WONG SHUI FUN trading as YAU LEE 1st Defendant

COMPANY

(黃瑞芬經營的有利工程運輸公司)

(Discontinued pursuant to the Order of

Master K. Lo dated 20th March 2009

TASTE INTERIORS LIMITED 2nd Defendant

(入時設計營造有限公司)

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Coram : Deputy District Judge Edward Shum in Court

Dates of Hearing : 14th & 15th December 2009

Date of handing down Judgment : 11th March 2010

JUDGMENT

*History of these proceedings*

1. In this action, the Plaintiff claims damages for physical injuries resulting from an accident at work on 19th June 2005 [“the Accident”]. The Writ of Summons herein was originally issued from the Registry of the High Court on 23rd August 2007 (HCPI No.745 of 2007 refers). However, by an Order of Master Ho dated 16th March 2009, the action was transferred down to this Court on the ground that the Plaintiff’s claims would fall within the jurisdiction of the District Court. In making the order for transfer, the learned Master also ordered that all costs incurred before the transfer including costs of the application for transfer shall be at the District Court scale and be costs in the cause.

2. And by an Order of Master K Lo dated 20th May 2009, leave was granted to the Plaintiff to discontinue his claims against the 1st Defendant. At the beginning of this trial, Mr. Chung, the Plaintiff’s solicitor, also confirmed with me that the Plaintiff would abandon any claim against the 2nd Defendant in excess of $1 million pursuant to section 34 of the District Court Ordinance, Cap. 336.

*Corresponding Employees’ Compensation Claim*

3. As a result of the Accident, the Plaintiff also brought an application for compensation against the 1st Defendant and the 2nd Defendant pursuant to the Employees’ Compensation Ordinance, Cap. 282 (DCEC No.504 of 2007 refers). His application for employees’ compensation was heard by Her Honour Judge Mimmie Chan on 28th and 29th May 2008. At that hearing, the 1st Defendant appeared in person whilst the 2nd Defendant was being absent. The 1st Defendant contested the application for employees’ compensation in a number of respects, and in particular, whether the Plaintiff was at the time of the Accident one of his employees or that of the 2nd Defendant.

4. In her judgment dated 11th July 2008, Her Honour Judge Mimmie Chan made *inter alia* the following findings:-

(1) the Plaintiff was at the time of the Accident an employee of the 2nd Defendant and in recruiting the Plaintiff the 1st Defendant was merely acting as an agent for the 2nd Defendant;

(2) the Plaintiff’s average monthly earnings at the time of the Accident were $10,580; and

(3) the Plaintiff is capable of returning to his pre-accident job as a delivery worker after the expiry of his sick leave.

5. That judgment has not been appealed. Her Honour’s findings are *res judicata* and they constitute issue estoppel in the respects which were contested. It is therefore only necessary for me to decide the following issues:-

(1) whether the Plaintiff’s injuries were caused by the 2nd Defendant’s negligence or breach of duties;

(2) whether there was any contributory negligence on the Plaintiff’s part; and

(3) what the proper level of damages is under each head claimed.

*Liability of the 2nd Defendant*

6. The Plaintiff’s case, quite shortly, is that he and his colleague, one Mr. Cho Man Wo, were assigned to unload certain gypsum boards from a lorry at the cargo apron (3rd Floor) of the Hong Kong International Airport and to deliver them to a construction site located on the 7th Floor of the departure hall at the Passenger Terminal Building.

7. The Plaintiff and his colleague were provided with a 4-wheel metal cart and together they loaded 12 pieces of gypsum boards, weighing over 300 kg, onto the metal cart. When reaching the lobby on the 7th Floor of the departure hall at the Passenger Terminal Building, the Plaintiff came out from the cargo lift first. His colleague then pushed the metal cart from the rear whilst the Plaintiff pulled the metal cart in the front. Just when they exerted force to get the metal cart out from the cargo lift, it suddenly toppled. The Plaintiff could not escape in time and the metal cart together with the gypsum boards then fell onto him causing serious injuries to his right leg.

8. The main thrust of the Plaintiff’s case on liability, quite shortly, is that it was the first time that he was assigned to do this task. He was an inexperienced worker and he had only worked in the airport for 2 days before the Accident. In this connection, I have no hesitation in accepting what the Safety Officer had said in his Accident Report about the 2nd Defendant’s failure to provide the Plaintiff with the adequate training, instruction and supervision:-

“4.4 *Safety information and Safety instruction*

Before the accident I/P had not been informed of the safety information and safety instruction that related to the handling of gypsum boards Indeed, it was the first time that the I/P handled the gypsum boards and the I/P had no previous information on the size and the weight of the gypsum boards. Even worse, he did not know how to handle the gypsum boards. Hence, during the accident, I/P just did what the CHO did even if CHO was also green at his job. In fact, CHO revealed that he did the gypsum board delivery work only one time in early June.

4.5 *Training and supervision*

I/P was a fresh Form 7 school-leaver. He had not received any formal training on manual handling operation. During the accident, I/P and CHO had to handle the gypsum boards over 300 kg (each pair of gypsum boards was over 50 kg). It was obvious that strenuous effort was required to handle the loads…As such, suitable training and supervision were considered to be essential and crucial for handling the gypsum boards.”

9. I also find on the evidence that the 2nd Defendant was negligent and in breach of its employer’s duty to provide the Plaintiff suitable and safe equipment. Again, I fully endorse what the Safety Officer had said about this point in his Accident Report:-

4.7 *Deficiencies of existing arrangement for delivering the gypsum board*

(1) The metal cart involved in the accident was not designed for the transportation the gypsum boards.

(2) The gypsum boards were not secured by wires or other means during the transportation so that the gypsum boards would easily be slipped out from each other because of their smooth surface.”

*Contributory negligence*

10. Since the 2nd Defendant was absent and consequently adduced no evidence at this trial, strictly speaking, I need not deal with the particulars of contributory negligence pleaded in its defence to the Plaintiff’s claim. However, I still have to look at the whole circumstances and consider if there was any contributory negligence on the Plaintiff’s part. In this connection, the Plaintiff told me in the course of oral testimony at trial that owing to uneven weight distribution the metal cart almost toppled when he and his colleague were loading the gypsum boards onto it. But then again, I must not ignore the fact that the Plaintiff was an inexperienced worker. It was certainly not for him to devise the proper system of work or to decide on which equipment he should use. In any case, he and his colleague were given no other equipment but the metal cart. In my view, there is simply no basis for a finding of contributory negligence here. The Plaintiff therefore succeeds wholly on liability.

*Quantum*

11. According to the medical report dated 22nd February 2007 prepared by Dr. Cheung Kim Wai of the Department of Orthopaedics & Traumatology of the Princess Margaret Hospital, the Plaintiff was admitted into his department through the Accident & Emergency Department on 19th June 2005. The Plaintiff gave a history of right leg injury at work earlier the same day. On examination, there was swelling and tenderness over the right thigh. X-ray also showed fracture at shaft of the right femur. Emergency operation, namely closed reduction and internal fixation with IM nail was performed on the same day. The post-operative course was uneventful. The Plaintiff was discharged from hospital on 27th June 2005. Thereafter, the Plaintiff attended regular outpatient follow-up and physiotherapy. The fracture united subsequently and the Plaintiff was readmitted to the Princess Margaret Hospital for removal of implant in December 2006.

12. And according to the physiotherapy report dated 23rd March 2007 prepared by physiotherapists of the Alice Ho Miu Ling Nethersole Hospital, the Plaintiff had attended 2 courses of physiotherapy with a total of 47 sessions. By the time of his discharge viz. 12th February 2007, the Plaintiff’s right hip and knee were found to have full range of movement with no pain. Muscle power of right hip and knee were also full. Moreover, he was able to squat fully with no pain; walking and running with normal gait; and sitting and standing with no limitation.

13. Through the arrangement of his solicitors, the Plaintiff’s physical condition was assessed by Dr. Johnson Lam, a specialist in orthopaedics & traumatology, on 3rd December 2007. In his subsequent medical report on the Plaintiff dated 12th December 2007, Dr. Lam opined that the Plaintiff’s right femoral fracture had reached maximal medical improvement. Whilst the Plaintiff might still have some residual pain in his right hip and knee, objective physical examination revealed good ranges of motion of his right lower limb and there was no significant wasting noted. X-ray also showed that the fracture in the right femur had united in good position. For the X-ray of the right hip, heterotopic ossification was noted at the tip of the greater trochanter (which was the entry site for insertion of intramedullary nail), corresponding to the site of maximal tenderness and pain complained by the Plaintiff. There were also several surgical scars over the lateral aspect of right hip. These scars were however non-tender.

14. Dr. Lam further opined that the Plaintiff should be able to return to his pre-accident job. As to his overall physical fitness, whilst mild reduction would be expected, Dr. Lam believed that with further training, the Plaintiff should be able to meet the physical requirement of disciplinary forces. All in all, Dr. Lam considered the whole person impairment to the Plaintiff should be 3%.

*Pain, suffering & loss of amenities of life [PSLA]*

15. In his closing submission, Mr. Chung, the Plaintiff’s solicitor, referred me to the following cases and argued that a sum of $350,000 should be awarded under this head:-

(1) *Poon Chung Fai v Leung Ka Shing* (unreported) HCPI No.1050 of 1999; Beeson J.; 8th December 2000;

(2) *Yusaf Ednan v Leighton Kumugai Joint Venture* (unreported) HCPI No.684 of 2001; Jackson J; 23rd May 2007; and

(3) *Chong Yiu Fat v Fong Man Chi* (unreported) HCPI No.742 of 2001; Reyes J; 24th December 2003

16. However, I do not find the condition of the Plaintiff to be as serious as the plaintiffs in any of these cases. And thus, for instance, in the case of *Poon Chung Fai* and the case of *Yusaf Ednan*, there the plaintiffs were left with a limping gait but the Plaintiff in the present case can walk with a normal gait and he can even perform tip toe walk and heel walk. The case of *Chung Yiu Fat* involved injury to ankle and damage to the articular surface of the distal tibia which were completely different from that involved in the present case.

17. In my view, the Plaintiff’s case here is comparable to that involved in the following cases:-

(1) *Lai Kwan Ming v Lee Yin Hing t/a King Yip Company & Another* (unreported) HCPI No.765 of 2000; Deputy High Court Judge Lam; 11th October 2001; and

(2) *Lau Tsz Wan v Caltex Oil Hong Kong Ltd. & Another* (unreported) DCPI No.140 of 2001; Judge H C Wong: 8th December 2004

18. And thus, like the present case, the plaintiff in the case of *Lau Tsz Wan* also sustained a fracture at neck of his right femur which required surgical intervention by means of closed reduction and hip screw fixation. Medical expert opinion adduced at trial was that the fracture had united. Although there was residual pain and stiffness at the right hip, there was no wasting of muscle either of the right leg or thigh. Moreover, the plaintiff was found to be walking normally with no limp. She could even walk on tiptoes and on heels. General damages for PSLA were assessed at $250,000.

19. Using the case of *Lau Tsz* Wan as my starting point and taking into consideration the Plaintiff’s medical condition as outlined above, I find the appropriate award for PSLA here should be $250,000.

*Loss of Earnings & MPF benefits*

20. As mentioned above, the Plaintiff is bound by the finding of Judge Mimmie Chan that his average monthly earnings at the time of the Accident were $10,580. From the medical certificates available, the Plaintiff was granted a total of 206 days of sick leave from 19th June 2005 to 18th December 2005 and from 21st December 2006 to 10th January 2007. Accordingly, pre-trial loss of earnings & MPF benefits would be:-

$10,580 / 30 x 1.05 x 206 = $76,282

21. As to the future loss, I do not accept the Plaintiff’s contention that his failure to join the disciplinary forces of the Hong Kong Government was caused by the injuries and permanent disabilities that he suffered as a result of the Accident. There is in fact hardly anything in the evidence to support this contention. Also, I fail to see why the Plaintiff would need to quit his job as a customer services officer (with an average monthly salary of $10,852.90). The Plaintiff was indeed constrained to admit that he changed his job on his own volition. In any case, I accept the medical opinion of Dr. Johnson Lam that the Plaintiff is physically capable of returning to his pre-accident job as a delivery worker. Accordingly, I make no award under the head of future loss.

*Special damages*

22. In his Revised Statement of Damages, the Plaintiff claims a sum of $4,717 as reimbursement for medical expenses incurred and a sum of $1,620 as reimbursement for travelling expenses incurred. In my view, the Plaintiff’s claims are reasonable in amount and should be allowed in full. Accordingly, the total award under this head is $6,337.

*Summary*

23. The total award is:

(1) PSLA : $250,000

(2) Loss of Earnings : $76,282

(3) Special Damages : $6,337

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Total : $332,619

24. Against this sum, credit must be given for the employees’ compensation of $82,243 (together with interest thereon) already assessed and awarded by Her Honour Judge Mimmie Chan under DCEC No.504 of 2007.

*Interest*

25. I also award interest at 2% per annum on general damages from the date of the writ to the date of judgment and thereafter at judgment rate. As for the damages for pre-trial loss of earnings and special damages, interest would be awarded on these damages at half judgment rate from the date of accident to the date of judgment and thereafter at judgment rate.

*Costs*

26. The Plaintiff will have the costs of the action but in view of the amount of the award it seems to me that there must be on the District Court scale. Accordingly, I make an order *nisi* that the 2nd Defendant do pay to the Plaintiff the costs of this action to be taxed on the District Court scale if not agreed.

( Edward Shum )

Deputy District Court Judge

Legal Representation

Mr. Henry Chung, of Messrs. Yip, Tse & Tang (assigned by DLA), for the Plaintiff

Taste Interiors Limited, in person, absent