#### DCPI842/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 842 OF 2008

BETWEEN

CHENG LIU NEI SU Plaintiff

and

CLARE ENVIRONMENTAL SERVICES

LIMITED Defendant

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

Dates of Hearing: 13 and 14 July 2009

Date of Delivery of Judgment: 30 July 2009

## J U D G M E N T

1. The plaintiff was an employee of the defendant, Clare Environmental Services Limited.
2. She claimed against the defendant for damages suffered at work on 3 May 2005 at the gym of the clubhouse of Grandview Garden at 71 Pau Chung Street, To Kwa Wan in Kowloon.
3. The defendant is and was a cleaning services company responsible for the daily cleaning work of Grandview Garden at 71 Pau Chung Street, Kowloon, To Kwa Wan (hereinafter referred to as Grandview Garden).

The Plaintiff’s Case

1. The plaintiff, Madam Cheng Liu Nei-su (“Madam Cheng”) was employed by the defendant, Clare Environmental Services Limited (hereinafter referred to as “Clare”) in 2003 as a cleaning foreman.
2. She later worked for the Hong Kong Jockey Club but returned to work for Clare on 1 January 2005. She was then placed to work at Grandview Garden at a monthly salary of $6,300, working six days a week between the hours of 7.30 am and 5.30 pm each day.
3. Her usual duties included keeping a roster and supervising the work of the four cleaning workers under her, ordering cleaning materials and overseeing the cleaning work, and cleaning the management office area herself.
4. According to Madam Cheng, the day-to-day work would be done by the four cleaners of the four housing blocks under her supervision. When major cleaning work was involved, Clare would arrange for additional manpower to take up the extra duties, but in cases of emergency and urgent business, she herself would take up the extra duty, which may include cleaning and rubbish collecting.
5. On the morning of 3 May 2005, after Madam Cheng finished the cleaning at the office of the management office, she received a call from the senior supervisor, Miss Yu of Chevalier Property Management Limited, the buildings management company. She was told there would be extra cleaning work at the newly renovated gym room at the clubhouse of Grandview Garden that day to prepare for the opening of the gym on the next day.
6. She called her supervisor, Mr Kong, the regional manager of the defendant, and informed him of the extra duty at the gym that day. She claimed that Mr Kong told her there would not be any extra manpower deployed to do the work. She was told to handle the extra work herself with her staff. She was told that she could purchase any necessary implements including scrapers and bottles of alcohol to do the work.
7. At around 2 pm that day, she took the four cleaners with her and started to clean up the gym. The work involved removal of adhesive plastic sheets on the new glass walls of the gym.
8. At around 4 pm, she told the four cleaners to return to their respective building blocks at Grandview Garden to finish their regular cleaning duties for the day while she carried on working in the gym, cleaning the plastic adhesive sheets located at the top of the glass walls.
9. In order to work on the top level, she used a 5 foot A-shaped ladder to access the adhesive tapes at the top of the glass wall area. She was assisted by one of the four cleaners who would hold the ladder while she was working on the top of the glass walls, but after the four cleaners were sent back to their regular duties at 4 pm, she remained and worked at the plastic adhesive sheets by herself. She said she would pull one end of the plastic adhesive sheet and use the other hand to hold on to the ladder.
10. At around 4.20 pm, while she was pulling one piece of the sheets away from the glass wall, the sheet suddenly broke and she fell off the ladder, landing on her buttocks and back. She felt pain at her back and immediately returned to the restroom to rest.
11. At around 5.30 pm, she reported the incident to the supervisor at the management office of Chevalier and to her own supervisor, Mr Kong. She claimed that the management office of the building checked the CCTV surveillance tape of the gym room and verified the incident before entering the incident in the management office occurrence book.
12. She claimed that Mr Kong had informed her when she reported the accident to him that she should not tell others she had fallen from a ladder. He told her the insurance company would not compensate her for the loss if she said she fell from a ladder.
13. Madam Cheng was taken to Queen Elizabeth Hospital by ambulance at around 6 pm. After examination and diagnosis by the accident and emergency doctors, she was treated and discharged home. She was followed up at the Robert Black General Outpatients Clinic and later, the Queen Elizabeth Hospital Orthopaedics Department. Subsequently, she received physiotherapy and occupational therapy treatments at the Queen Elizabeth Hospital.
14. About six months after the accident, she developed mental depression due to the residual back pain which affected her sleep and well-being. She sought treatments for the depression at the East Kowloon Psychiatric Centre and received follow up treatments regularly up to the present. Medications were prescribed to her to help relieve her complaints.
15. On 23 May 2008, she was assessed by the Medical Assessment Board that her loss of earning capacity due to the injury was 1%. She applied for a review of the assessment. On 3 April 2009, the Medical Assessment Board issued a Certificate of Review of Assessment, it accepted her sick leave period to be between 3 May 2005 and 2 May 2008. However, the board maintained the assessment of loss of earning capacity at 1% (page 173 of the bundle).
16. She further received an occupational assessment in March 2008 which certified her for light physical duties, such as household cleaning and weightlifting of under 25 pounds for lifting up to waist level and under 15 pounds for lifting up to shoulder level.
17. She claimed she did not receive any instructions from her employer on working at heights, that there was very little supervision of her work by the defendant at Grandview Garden, neither were there any safety warning or instructions on working with a ladder from the defendant.
18. Madam Cheng claimed the accident had affected her in many ways. Not only did she suffer from residual back pain, her sleep had been affected and her social and marital relationships were also affected. She accepted that she could not return to her old job.
19. Madam Cheng adduced medical reports from joint experts on her health conditions after the accident and her present mental conditions. It is not disputed that Doctors Lam and Choy, Orthopaedics specialists, agreed Madam Cheng can no longer return to her old job. They agreed that she can take up lighter cleaning duties.

The Defence Case

1. The defence agreed that Madam Cheng was an experienced cleaning foreman in charge of supervising the four cleaners at Grandview Garden and the quality and process of work of the cleaners working under her, her duties included reporting to her supervisor at the defendant’s office.
2. It was Mr Kong’s evidence that Madam Cheng reported the accident to him on the day of the accident and he had told her to go to the Accident and Emergency Department of the hospital for treatment. Mr Kong, however, denied Madam Cheng had asked the defendant earlier that day for cleaning assistance and extra resources due to the additional and non-regular work at the gym of Grandview Garden. He alleged that Madam Cheng had told him after the accident that she had tripped on a chair at the gym and fell down hurting the back of her spine.
3. Mr Kong agreed that he had signed the accident report filled in by his staff on 4 May 2005, (see page 157), it stated that Madam Cheng had tripped, slipped and fell at the clubhouse injuring the back of her spine.
4. The Form 2 filed by the defendant to the Labour Department on 14 May 2005 was signed and filled in by another staff of the defendant, Miss Chan Hiu-ling (see page 158). She had also signed a letter dated 6 June 2005 to Miss Yu of Chevalier Property Management Limited (page 162 of the bundle).
5. On 28 March 2006, Miss Chan sent a letter signed by her to the Labour Department amending the earlier letter, admitting Madam Cheng did use an A-shaped ladder at work at the clubhouse of Grandview Garden and she had fallen down from it while cleaning the plastic adhesive tape stains from the wall injuring the back of her spine (see page 174 of the bundle).

Findings On Liability

1. Madam Cheng claimed that the defendant’s staff had failed to give her any training on working at high levels or give her any instructions on safety for using a ladder at work.
2. She further claimed she was told on the morning of the accident when she reported by telephone to Mr Kong about the extra cleaning work at the new gym installed at the clubhouse was due to open to residents the next day. She claimed Mr Kong had informed her there would be no extra resources deployed at Grandview Garden that day and that he would not be visiting Grandview Garden to inspect the work required.
3. Madam Cheng was told to use existing resources to do the extra work. She was told that she should get the necessary implements or equipments to do the job, including scrapers and alcohol for cleaning stubborn stains. She was told she would be reimbursed for the extra tools required.
4. On the other hand, Mr Kong though admitting he was informed about the cleaning work at the gym, claimed he thought they were the cleaning team’s regular duty. He denied he told Madam Cheng to get the equipment for removal of adhesive tapes.

1. At the same time, he claimed in court he could not recall much of what was said by him to her on the phone that morning. He further claimed he would visit Grandview Garden between one to three times a month. On these visits, he would do the rounds of the building checking the state of cleaning, and he would also offer training to the cleaning staff in the afternoon.
2. He also claimed he would explain the safety regulations to the staff during their lunch break. He claimed the safety regulations was not compiled by him or the defendant, he had adopted the Labour Department Safety Regulations.
3. Mr Kong denied he had told Madam Cheng not to tell anyone she had fallen from the ladder at work because the insurance company would not pay any compensation. He agreed that he had accepted Madam Cheng to be an experienced cleaning supervisor because she had told him she used to operate her own cleaning service company.
4. After observing the demeanour of the witnesses, including Madam Cheng and Mr Kong, and after reading their witness statements and other statements, including documentary evidence, I find Madam Cheng’s version of the accident to be credible. The descriptions of her using the ladder to reach the top part of the glass wall at the gym and that before 4 pm she was assisted by one of the four cleaners who had held the ladder while she was working on the top part of the glass wall was consistent and reasonable.
5. I find Mr Kong’s evidence on the telephone conversations with Madam Cheng on the day of the accident to be inconsistent. He admitted at the hearing that he could not remember much of what was said. He agreed however that Madam Cheng did tell him about the cleaning work at the gym but denied she had asked him to come for an inspection or that she had asked for extra resources or manpower. He further denied she had told him the work would require scrapers and alcohol to remove the tapes and stains and that he had told her to purchase the necessary tools. He also claimed in court that the extra work he thought were the team’s regular duty.
6. Upon reflection of the evidence, I do not think it is likely that Madam Cheng would not ask for extra manpower when she and her team had their hands full with their regular cleaning duties.
7. It stands to reason that when extra resources were required but not supplied, Madam Cheng and her team would have to take upon themselves the extra work when the gym was due to open to residents the next day.
8. It also stands to reason that she would require the necessary tools to remove the adhesive tapes and stains left on the glass. That was why she claimed she had asked for permission to purchase these tools from Mr Kong. Yet, Mr Kong had no recollection of the request.
9. It is clear that Mr Kong’s memory of the events of that day is unreliable when he admitted he could not recall the details of the extra work at the gym or what was involved or much of what he told Madam Cheng on the telephone that day.
10. When Mr Kong was questioned on the cleaning of high levels by the defendant’s staff in court, he claimed he would do an inspection of the premises first but he insisted that the use of ladders to be unnecessary in cleaning jobs. He also claimed that he had posted safety regulations notices at the cleaning staff’s restroom. This was emphatically denied by Madam Cheng.
11. He further claimed that for cleaning at high places, the defendant would supply poles and mops to its staff. He claimed that for difficult to reach high levels, a metal platform would be erected. After giving the description of the height and width of the metal platforms, he admitted it would not be suitable for use inside the gym at Grandview Garden.
12. He claimed he did not consider there would be a need to use a ladder to carry out the cleaning work and, according to him, it was not used. In spite of that, he claimed he had trained the cleaning staff on the use of the ladder in cleaning duties.
13. I find his evidence to be inconsistent and unreasonable. If Mr Kong insisted that the use of ladder to be unnecessary, why would he give any training or warning on the use of ladder to the cleaning staff? For this reason, I do not think Mr Kong’s evidence reliable.
14. I accept Madam Cheng’s evidence on the accident, that she had fallen from the ladder while she was trying to remove the adhesive sheets from the glass walls sitting on the ladder in order to access the top of the glass wall.
15. I also find that she did inform the defendant through her supervisor, Mr Kong, on the morning of the accident that extra duties were involved but she was told she had to handle the work with existing human resources. She was told she would be reimbursed for the tools she needed for the extra work at the gym. She was not given any supervision on this extra duty at the gym room.
16. I further find that the defendant had failed to supply proper and suitable safety training to Madam Cheng on cleaning work at high levels.
17. The defendant had also failed to supply her with proper equipment and supervision. It is apparent that Mr Kong, Madam Cheng’s supervisor, had no idea what the extra work at the new gym involved, neither did he wish to find out. Even though he admitted to have been told of it by Madam Cheng, he had little recollection of the contents.
18. I find the defendant was in breach of an employer’s duty. The defendant was also in breach of occupier’s liability as the contractor to Chevalier Property Management Limited and infringing Section 6 of the Occupational Safety and Health Ordinance, Cap.509, in failing to ensure the safety and health at work of its employee, Madam Cheng, under Section 6(1) and failure to provide such information, instructions, training and supervision necessary to ensure the safety and health at work of the employee under Section 6(2)(c), as well as failure to provide or maintain a working environment for the employee that is safe and without risks to health, under Section 6(2)(e).
19. I do not consider Madam Cheng to be guilty of contributory negligence. As McNair J held in Machray v Stewarts and Lloyds Limited [1964] 3 All ER 716, at page 7, 21E:

“When I find a workman, an employed man, adopting a course of conduct not for the sake of saving himself trouble but in order to get on with his employer’s business, and I find that he had been prevented from doing the work in the way in which he would have preferred to do by the employer’s breach in not providing him with the proper tackle, I am very slow to put any blame on him.”

Quantum - Pain, suffering and loss of amenities

1. The plaintiff’s counsel referred to a number of cases with similar injuries. The more appropriate cases included the case of Ahmed Masood v Chung Kau Engineering Company Limited, DCPI517/2003 (date of judgment 28 January 2005) a judgment of District Judge Ng, where the 57 year-old security worker sustained mild back sprain as a result of a slip and fall at work while carrying metal pipes. He was not able to return to his pre-accident job. He could only do light duty work after the accident due to the permanent residual symptoms of back pain and discomfort. The sum of $130,000 was awarded under PSLA.
2. In the case of Tam Kwok Man v The Kowloon Motorbus Company (1993) Limited, HCPI775/2001 (date of judgment 11 July 2003) a judgment of Madam Justice Beeson in the High Court. The 50 year-old bus driver fell on the ground from an office chair sustaining back injury resulting in minor back impairment and residual pain. The court allowed 9 months’ sick leave though it found certain degree of exaggeration in the plaintiff’s complaint of his symptoms. The court further accepted the plaintiff had suffered from depression but found it was occasioned by his inactivity rather than resulting from the accident. The sum of $150,000 was awarded.
3. Mr Lim, counsel for the defence, relied on the Court of Appeal case of Tam Fu Yip v Sincere Engineering & Trading Company Limited, HCPI473/2006. The Court of First Instance’s judgment by Saw J was handed down on 6 June 2007, while the Court of Appeal date of judgment was 8 April 2008. The trial judge found the plaintiff had grossly exaggerated his injuries. He was found to be fit and able to return to his former employment four months after the accident. The appeal to the Court of Appeal was only on the point of the length of the sick leave period. The trial judge’s award of PSLA remained unchallenged at $75,000.
4. According to the joint medical report of Doctors Johnson Lam and Danny Choy, after examining Madam Cheng, her history of treatments after the accident and the MRI taken in 2007, they found features suggestive of some soft tissue injury but there was no major structural damage to the back.
5. They found that some of the simulation tests were positive. It suggested Madam Cheng was magnifying her disability to some degree. The two doctors concluded that Madam Cheng had suffered soft tissue injury with residual pain but the described symptoms are disproportional to the actual injury sustained.
6. Dr Choy considered the pain to be either psychosomatic or voluntary exaggeration while Dr Lam considered that it was likely there was an element of genuine residual pain but the degree was likely to be mild at the time of the assessment. Both doctors agreed that she could return to moderate manual duty work. Both doctors agreed the residual pain on the back soft tissue contusion injury is 3 per cent impairment of the whole person while the loss of earning capacity is estimated to be 3 to 4%.
7. Madam Cheng developed mood changes and sleeping difficulties 6 months after the accident. She began seeking treatment at the East Kowloon Psychiatric Centre and received medications for her mood and sleep problems. The medical report from Dr Lau Shun-tung Benjamin, senior medical officer at East Kowloon Psychiatric Centre of 17 November 2008 (at page 132) confirmed she had complained of low mood, crying episodes, insomnia, reduced appetite, inertia and anergia. She was found to be of borderline mood with a sense of failure and diagnosed for depression. Dr Lau assessed her psychiatric impairment to be 1%.
8. She was later examined by Dr. Lam Wun-tong and Prof. Wong Chung-kwong on 15 January 2009. In their joint report of March 2009, they agreed Madam Cheng suffered from adjustment disorder with depressed mood. They further agreed that the persistent back pain of Madam Cheng and limitation of function cannot be explained by the disorder. However, Dr Lam considered that depressed mood may intensify the feeling and intensity of pain.
9. Both doctors considered Madam Cheng suffered from a mild form of adjustment disorder and depressed mood. She is deemed fit to return to her previous job solely from a psychiatric perspective. Dr Lam found her work capacity is only limited by her physical disability. He estimated the degree of impairment of the whole person due to adjustment disorder to be 3%, the loss of earning capacity assessed at 3%, while Prof. Wong considered the impairment of functioning on psychiatric ground to be 1%. However, he considered that it should have minimal effect on Madam Cheng’s daily function or work capacity.
10. Taking into account Madam Cheng’s pain, suffering and loss of amenities, supported by the joint orthopaedic experts’ reports and the joint psychiatric report, I accept Madam Cheng had reached maximum medical improvement level so far as her back is concerned. If she continues with the home exercises that the physiotherapist taught her, her condition could be maintained and continue to improve. Both psychiatrists considered her to be fit to resume work.
11. Professor Wong considered one of the stress factors of Madam Cheng is the present litigation that once the litigation is over, she should be able to put the litigation and the unhappy episode behind her and get on with her life.
12. I agree with the opinion of Professor Wong and Dr Benjamin Lau (attending doctor at East Kowloon Psychiatric Centre) that Madam Cheng’s depression and mental state is mild and constituted only 1% of loss of earning capacity. Adding that to the 3% of loss of earning capacity due to her residual pain and discomfort, the total loss of earning capacity is 4%. I would therefore assess the award for Madam Cheng’s condition under PSLA at $150,000 for I consider her condition is similar to the plaintiff in the case of Tam Kwok Man v KMB.

Loss of Earnings - Pre-trial Loss

1. Madam Cheng’s pre-accident monthly wage was $6,300. It is not disputed. The dispute lies in the period of sick leave. Madam Cheng’s claim is for 1,094 days from 3 May 2005 to 21 July 2008.
2. Dr Lam, the orthopaedic specialist, considered Madam Cheng’s complaint of residual pain was likely to be genuine while Dr Choy thought it was either psychosomatic or voluntary exaggeration. In Dr Lam’s opinion, the duration of sick leave issued by her doctors was appropriate, while in Dr Choy’s opinion, the sick leave for simple soft tissue contusion of the buttocks should be limited to 6 months.
3. From the Hospital Authority’s record, Madam Cheng had gone for medical consultations without interruptions and obtained sick leave between 9 May 2005 at the Robert Black General Outpatients Clinic six days after the accident up to 1 April 2006, when she was referred to physiotherapy.
4. She returned to the Robert Black Clinic on 4 July 2006, 3 months later, for the same complaint of back injury and she was given continuous sick leave until 10 August 2006. The sick leave expired on 14 August 2006 (see pages 96 to 101), during which time she received three courses of physiotherapy and occupational therapy treatments. She then went to the Queen Elizabeth Hospital again and consulted the doctors at the Orthopaedics and Traumatology Department on 24 August 2006, where she was treated symptomatically and put on work hardening program at the Occupational Therapist Department until 17 January 2007 for two sessions a week.
5. The consultant at the Orthopaedics Department of Queen Elizabeth Hospital examined her on 18 January 2007 and found no significant problem with her condition and referred her to the Medical Assessment Board.
6. On 3 May 2007, she was referred to the Accident and Emergency Department of QEH which referred her to the Physiotherapy Department again for her back pain. She was given 15 sessions of physiotherapy treatments up to 5 September 2007.
7. On 26 February 2008, she was again referred by the Orthopaedics Department at QEH for functional capacity evaluation testing. It was done on 15 March 2008 and she was assessed to be able to perform sedentary and light physical work including administrative duties, light cleaning work and handling weight up to 25 pounds from floor to table, 15 pounds from table to shoulder level.
8. Considering the aforesaid medical consultation background and taking into account the comments of the four medical experts on Madam Cheng’s physical and mental conditions and the orthopaedic experts had considered Madam Cheng did exaggerate her physical discomfort on her back, I regard the 1, 094 days of sick leave claimed to be highly excessive.
9. However, in view of the depressed mood she began suffering from six months after the accident and her adjustment disorder and the repeated visits for physiotherapy and occupational therapy treatments, I am inclined to allow a period of sick leave from 3 May 2005 to 17 January 2007, that is 20½ months.
10. On 17 January 2007, she was examined by the QEH consultant at the Department of Orthopaedics, Dr Ching Ping-hong, who found no significant problem with her and referred her to the Medical Assessment Board.
11. Under such circumstances, I allow the Pre-trial Loss of Earnings as follows: -

$6,300 x 20.5 = $129,150.00

+ 5% (MPF) = $6,457.50

$135,607.50

Loss of earning capacity

1. For reasons explained above, she suffered a loss of earning capacity of 4%. She has shown that if not for the accident she would have a better employment opportunity in the labour market. I am prepared to allow a period of 3 months for her retraining to more suitable employment. The 3 month salary at $6,300 a month is allowed and it comes to $18,900.

Future medical expenses

1. Since both Doctors Lam and Wong agreed Madam Cheng’s chosen consultation at the public sector at the East Kowloon Psychiatric Centre is appropriate for her future treatments, I would allow the sum of $1,200 as suggested by the two doctors.

Medical expenses

1. These were supported by receipts and they come to $28,457. As the defence is not challenging this sum, I allow it in full.

Tonic foods

1. Madam Cheng asked for the sum of $55,186 for the use of tonic foods. I find the use to this extent is excessive. There was no advice from a specially qualified person on the use of expensive delicacies such as ginseng, bird’s nest and cordyceps for a soft tissue injury on the back. I will allow the sum of $5,000 only.

Travelling expenses

1. On the basis that Madam Cheng had 2 to 3 years’ visits to the HA clinics and hospitals, I will allow the travelling expenses claim of $5,000 in full.

Summary

1. (1) PSLA $150,000

(2) Pre-trial loss of earning $135,607.50

(3) Loss of earning capacity $ 18,900

(4) Future medical expenses $ 1,200

(5) Medical expenses $ 28,457

(6) Tonic foods $ 5,000

(7) Travelling expenses $ 5,000

###### Total $344,164.50

###### Less credit for advance payment

received $134,940.00

###### Total $209,224.50

Interest

1. Interest on general damages for PSLA at 2 % per annum from the date of writ to the date of judgment. Interests on special damages and pre-trial loss of earnings at half judgment rate from the date of accident to the date of judgment, thereafter, at judgment rate.

Costs

1. Costs to follow the event and would be borne by the defendant to be taxed if not agreed, with certificate for counsel. Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

# (H C Wong)

# District Court Judge

Mr Danny Ng, instructed by Messrs Tung, Ng, Tse & Heung, assigned by DLA for the Plaintiff

Mr Patrick Lim, instructed by Messrs Leung & Lau, for the Defendant