###### DCPI 910/2005

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 910 OF 2005

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##### BETWEEN

## CHAN SHING CHING Plaintiff

### and

#### HONG KONG DISTRICT SECURITY 1st Defendant

LIMITED

PAUL Y. CONSTRUCTION CO. LTD. 2nd Defendant

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Coram: H.H. Judge Chow in Court

Dates of Hearing : 22nd – 24th August 2007, 14th April 2008 and 9th May 2008

Date of handing down judgment: 19th June 2008

Judgment

1. This is an application by the Plaintiff for reliefs in respect of injuries, losses and damage sustained by him in an accident in the course of his employment with the 1st Defendant at a construction site situate at CT 9 Development, HIT Gatehouse and Other Works, Tsing Yi Lot, No. 9 and Town Lot No. 139, Hong Kong Special Administrative Region (“the Site”). At the material time, the 1st Defendant was providing security services to the 2nd Defendant at the Site.

The accident

1. On 8th July 2002, the Plaintiff was taken to the Site for the first time by his superior, a Mr. Cheung Moon, a staff member of the 1st Defendant. He saw a yellow Chinese dog (about 50 cm long and 20 pounds in weight) barking inside the Site. Cheung Moon told him about his duties and the places he should patrol, and said that computers were stored in the office in the upper level of the containers.
2. On 9 July 2002, he went to work at the Site for the first day. He was received by a “sub-contractor” Chan (“Chan”) who introduced himself as the person-in-charge there. He saw the dog roaming inside the Site. Chan said that the dog was his and told him not to touch it. Chan talked to him about his duties and the places he should patrol. Later on, 8 workers who had been doing civil engineering work at the Site, left in Chan’s van. He closed the gate after the van had gone off. Then the dog bit and scratched his trousers, but he did not report the matter to his employer because he did not want to cause trouble; he had just come to do the job there. He thought that it was not unusual that dogs were kept at construction sites.
3. On 10 July 2002, at around 6:30 p.m., he was walking down a staircase from the upper level of containers to the ground level for patrol. He was the only night-time guard there. When he was at the staircase, the dog bit his shoe string. He tried to shake off the dog with his right leg, but in doing so he lost his balance and fell down from the staircase. His right leg hit the stairs and was broken. As a result, he sustained open fracture of his right leg, with bone protruding out, and his leg had serious bleeding on his leg. He immediately reported the matter to the police and shortly thereafter he was sent to hospital by ambulance for medical treatment.
4. He denied that whilst he was in the hospital on 10 July 2002 he told Cheung Moon that he was feeding the dog when the accident occurred. When Chan came to visit him in the hospital Chan gave him his name card which bore the company name of the 2nd Defendant. He threw the card away in the litter bin because he thought that it was of no use.

The Defendants’ evidence

1. The Defendants called 3 witnesses to testify. They are Cheung Moon, Mr. Wong Ho Hong (“Wong”) and Mr. Lau Chi Kuen (“Lau”).
2. Cheung Moon was the Plaintiff’s supervisor. He was a staff member of the 1st Defendant. He could not remember the exact date of taking the Plaintiff to the Site. He did not see any dog at the Site before the accident. In the evening on 10 July 2002, the Plaintiff told him that he was feeding a dog on the upper level of the containers; he was frightened by the dog, and fell down from the stairs. In doing so his leg was trapped between two steps.
3. Wong was the security officer of the 1st Defendant. He said that the 2nd Defendant was the chief contractor of CT9 engineering work, and was responsible for the gatehouse of CT9. He pointed out that there was no subcontractor having the surname of Chan at the Site. He saw a dog after the accident. It was the first time he saw a dog at the Site.
4. Lau was the site agent of the 2nd Defendant. He was at the Site everyday. He said that there was no subcontractor surnamed Chan. No dog was bred at the site.

Analysis of evidence

1. There were bloodstains on the staircase and on the ground underneath the staircase. This is consistent with the Plaintiff’s evidence that he fell down from the staircase and sustained injuries to his right leg. I find that he did fall to the ground from the staircase at the material time.
2. On Form 2 (EX No. D4), the notice of accident compiled by the 1st Defendant, it was stated that when the accident occurred, the employee (the Plaintiff) was feeding a dog at the Site. If the Plaintiff had seen the dog on the ground and intended to feed it, he would naturally have fed it there and then. If he had seen it on the upper level of the containers, he would naturally have fed it there and then. In either situation, he would not have gone to the staircase and fed it there, because it would have been inconvenient to do so. It is simply inconceivable that when he was on the staircase, he saw the dog and intended to feed it and did feed it there and then, because it would be inconvenient to do so. If he had met the dog whilst at the staircase, he would either have gone up the staircase to the upper level of the containers, or gone down the staircase to the ground in order to feed the dog. It is simply inconceivable that he would have fed the dog whilst he and the dog were at the staircase. I do not find that just before his fall from the staircase he was feeding a dog at the staircase. I find that the circumstances of his fall from the staircase took place in the manners described by him. The Defendants comment that in view of his evidence that he lost his balance and fell backward, he could not have injuried his right leg. It must be borne in mind that all that happened in relation to his fall took place within a very short time; unless the Plaintiff could recall every single movement relating to his fall, there are bound to be tiny discrepancies in his description of his fall.
3. It is undisputed that the accident took place on the second day of the Plaintiff’s work. On the next day, according to Wong’s evidence, there was a dog inside the Site. It must be the same dog which caused the accident.
4. The purpose of keeping the dog at the Site must be for the purpose of scaring strangers or thieves away when they approach the Site. Obviously for this purpose a dog of ferocious character has to be kept, and for the same purpose the dog must be able to bark. When the Plaintiff went to work on the first day, he must have been received by the person-in-charge of the Site. That dog must have been kept or allowed to stay at the Site by that person-in-charge because he was the person-in-charge there. Since the Plaintiff was a new comer there, so the person-in-charge must have told him that the dog was his and not to touch it, in order to prevent him from being bitten by the dog. The Plaintiff referred to that person-in-charge as a Mr. Chan. There is no need for him to lie about his surname. I accept his evidence in this regard.
5. Lau attended the Site everyday. The dog was at the Site on 9th and 10th July 2002. . So he must be aware of the existence of the dog there and its ferocious character. He said that dogs could not get into the site. But this is contradicted by Wong’s evidence. Wong said that there was a dog in the Site on the second day of the accident. I find that both Defendants had knowledge of the ferocious character of the dog.
6. The 1st Defendant, being the employer of the Plaintiff, is under a duty to take reasonable care of his personal safety when he is at work. It knew that there was a ferocious dog at the Site, but it did not take steps to safeguard his personal safety. It could have requested the 2nd Defendant to leash the dog or give the Plaintiff a stick to protect himself. However, it failed to do so. Accordingly it is also liable for the accident.
7. The 2nd Defendant left the dog unleashed on the Site. It is simply foreseeable that the Plaintiff, a newcomer on the Site (and thus a stranger to the dog), would be liable to be attacked by the dog. But it also failed to take any measures to safeguard the Plaintiff’s personal safety. So it is liable for his injuries.
8. I find that both Defendants are equally to be blamed for the Plaintiff’s injuries.
9. I cannot find any contributory negligence on the part of the Plaintiff. When a dog, a ferocious one, bit the Plaintiff’s shoe string, he did not act unreasonably by kicking it away. At the material time he was just trying to protect himself. He could not possibly have known beforehand whether the dog merely intended to bite the shoe string and do nothing else further.

Injuries suffered by the Plaintiff

1. Due to the fall from the staircase to the ground the Plaintiff had a laceration wound at his right leg with bones exposed. X ray examination shows fracture at his right tibia and fibular. On 7.2002, wound debridement and application of external skeletal fixator was done. On 16.7.2002, removal of external fixator and intramedullary nailing of the right tibia was done. On 27.7.2002, he was discharged home with a walking frame. From 1.8.200 to 5.8.2002 he was admitted to the Tseung Kwan O Hospital for treatment of skin graft wound infection. He was confined to a wheelchair for 4 months after the accident. Thereafter he had to walk with a walking frame or walking sticks. Sick leave was granted up to 2.6. 2003.
2. On 3.4.2003, Dr. Mak Wai Hung made the following finding: walking with frame; very significant weakness and calf wasting. This clearly shows that his right lower limb disabilities had not improved well.
3. By October 2003 and after sick leave had expired, the Plaintiff’s right lower limb pain and weakness was still severe. From the surveillance video taken by the Defendants in October 2003 (without the Plaintiff’s knowledge) it can been seen that he required a walking frame when walking. He took rests on and off by the roadside. He said in Court that this was due to his right leg pain and weakness. I accept what he said.
4. He continues to suffer from his right leg pain, weakness and numbness. These symptoms fluctuate and are aggravated by bad weather and prolonged walking. When walking he still relies on a stick or a walking frame. He cannot do hiking which he used to enjoy prior to the accident.
5. On 14.10.2003, the defence expert Dr. Cheng first examined the Plaintiff. He noticed right thigh muscle wasting by 2 cm. He concluded that with the residual ache and pains, (i) the Plaintiff was perfectly able to resume his pre-accident job of a security guard, and (ii) a period of sick leave of 9 months would be reasonable for such injuries. When examining the Plaintiff Dr. Cheng was not provided with any of his medical reports or records. He only relied on his physical examination and radiological examination in reaching his opinions. He only knew at the time of examination that fractures of the distal right tibia and fibula had healed. The Plaintiff’s Counsel comments that without having sight of any medical records or reports, he could not know the extent of the fractures, whether open or closed, or displaced or non-displaced, and the treatment given. Dr. Cheng’s opinion on the Plaintiff’s working capacity is directly contradicted by the surveillance evidence which shows his manners of walking at that time. It is abundantly clear that he could not resume his former job as a security guard because he had to rely on a walking stick when walking. Regarding the sick leave of 9 months Dr. Cheng could not make a fair and accurate assessment of the reasonable leave required by the Plaintiff, because he did not know the extent of injuries and recovery process before the medical examination. These comments are well grounded, and I accept them.
6. Orthopaedic expert Dr. Fu examined the Plaintiff on 13.6.2006. Pain and weakness of the right lower limb complained of were supported by the evidence of muscle wasting of the right thigh and calf muscles. Dr. Fu assessed permanent impairment of the whole person at 6% in view of his muscle wasting, scarring and severe pain and considered that the Plaintiff in his then condition could not return to any gainful employment. He further advised that the Plaintiff should undergo an operation to remove the metal implants because the fracture has healed, the cost of which was estimated to be $30,000 if done in the private sector, whereas if the operation is done in the public sector the cost is nominal.
7. Based on Dr. Fu’s said report, Dr. Cheng in this second report dated 20.10.2006 concluded that the Plaintiff had made some improvement over the past 3 years because in 2006, muscle wasting was 1 cm only whilst in 2003, muscle wasting was 2 cm.
8. The Plaintiff submits that Dr. Cheng was clearly wrong. In 2003 Dr. Cheng examined that there was some muscle wasting of the right thigh by 2 cm. (circumference at 10 cm above kneecap, right 38 cm, left 40 cm.) In 2006, Dr. Fu’s measurements show thigh girths (10 cm above knee joint) of 35 cm (right) and 36 cm (left). These measurements show that the Plaintiff’s both thighs girth measurements had substantially reduced, from 38 cm (right) and 40 cm (left) in 2003 to 35 cm (right) and 36 cm (left) in 2006. This supports the Plaintiff’s case that he has been weak, or he has lost a lot of weight or had muscle wasting in both lower limbs. It is wrong for Dr. Cheng to say that “in fact, there is actually an increase in reasonable bulk of the thigh”.
9. Dr. Cheng commented that the Plaintiff had suffered injuries including laceration due to dog bite. This is clearly wrong, and had to be corrected in his third report. The Plaintiff’s submissions are well-grounded. Because of the mistakes made by Dr. Cheng, I reject his evidence. I accept Dr. Fu’s evidence, the surveillance evidence, and the evidence of the Plaintiff.

The Plaintiff’s working capacity

1. The Plaintiff was aged 57 at the time of the accident and is now 63 years old. He has remained unemployed due to his disabilities caused by the accident. His lower limbs disabilities cause him to walk in an awkward manner. This is clearly demonstrated in the surveillance tape taken by the Defendants on 14, 17 and 22 October 2003 respectively. That being the case, there can hardly be any prospect of his being re-employed as a security guard.
2. His evidence is that if he had not met the accident, he would have continued his job as a security guard, which he had been doing since 1996. The normal retirement of a security guard is 65 years old, but for a single block building, a security guard can work until the age of 66 to 70.

Pain, suffering and loss of amenities (“PSLA”)

1. In *Chan Kui v Lee Fai (t/a Fai Kee Timber)* (1997) 2 HKLRD 444 the Plaintiff had a compound fracture of the left tibia and right fifth metatarsal bone base. He underwent 2 operations at the left knee region, and was hospitalized for about 1½ months. PSLA was awarded at $350,000 in February 1997.
2. In *Cheung Ping v Pak Kee Transportation Ltd. & another* (1999) HKLRD Yearbook 588, the Plaintiff had factures of left tibia. He fibula and underwent 2 operations. He suffered mild pain when walking. The impairment of the whole person was assessed at between 4% to 8%. He underwent a third operation to remove the nails and pins. He had a pre-existing chronic varicose vein condition which was responsible for some of his disability though it was not aggravated by the accident. PSLA was assessed at $400,000 in July 1999.
3. In *Liu Hung Fai v Sandvik Hongkong Ltd. & anor.* (1997) 2 HKLRD 444, the Plaintiff suffered from her knee injuries and underwent operations on the left knee and was then in a convalescent home for 5 months. Her permanent disabilities included pain in her left knee and wasting of muscles. She walked with a limp and needed a stick in walking; she could not squat or climb up to a height. PSLA was awarded at $400,000 in April 1997.
4. The authorities referred to by defence counsel are related to fractured fibula only. As they are concerned with much less severe injuries, they are not applicable to the present case.
5. The Plaintiff made a claim of $350,000. This is a reasonable figure. I therefore allow this sum for his claim under PSLA.

Pre-trial and post-trial losses of earnings and MPF benefits

1. The Plaintiff had a monthly earning of $6,500 before the accident. He said that if he had not had the accident, he would have continued to work as a security guard or watchman at monthly earnings of not less than $6,500, until the age of 66 to 70 years old. Therefore his pre-trial loss of earning and MPF benefits during the pre-trial period (10.7.2002 – 9.5.2008) are calculated as follows:-

$6,500 x 70 months x 105% = $477,750

1. He claims 2 years’ future loss of earnings and MPF benefits. It in reasonable to allow this claim. The amount is $163,800 ($6,500 x 2 x 12 x 105%).

Miscellaneous Expenses and Other Special Damages

1. His wife was working as a factory worker at monthly earnings of $5,200 at the time of accident. She took 2 months’ leave off work for the purpose of taking care of the Plaintiff during the period of his hospitalization and in the initial period after discharge from the hospital. He was wheelchair-bound for 4 months after the accident and required help in bathing, toileting and preparing food for him after his discharge. He claims a loss of earnings suffered by his wife at $10,400. The Defendants submit that there is no proof on the actual earnings of the Plaintiff’s wife and that there is no proof that she took no pay leave to take care of him after the accident. I am satisfied that his wife did work as a caretaker. No doubt he needed someone to take of him during the said periods. No doubt the closest person to him, namely his wife, would do this. When she did not go to work, she would not receive any pay for that period. I find that his evidence is truthful. I allow this claim at $10,400.
2. After the wife had resumed work he hired a domestic helper for 2 months at $3,000 ($1,500 x 2 months) to take care of him in lieu of his wife. I accept that his evidence in this regard is truthful.
3. A summary of the miscellaneous expenses claimed by him is set out herein below:-

(a) Hospital and medical treatment $3,484

(b) Medical treatment in PRC $54,000

(c) Travelling expenses between PRC and HK $,4000

(d) Travelling expenses incurred in attending

treatment in HK $1,200

(e) Loss of personal properties (2 bags of

personal clothing and belongings, and

2 torches) $500

(f) wheelchair $1,100

(g) Walking stick $48

(h) Tonic food $12,000

(i) Chinese medicine $5,920

(j) Medical fees for private doctors $1,200

$83,452

1. Regarding item (a), the Plaintiff said that he went to Tseung Kwan O Hospital for follow-up treatment for 30 odd times. On each occasion he had to spend $60. The total sum is $1800 (60 x $30). He also went for other medical treatment for 13 times, spending $100 on each occasion. The total sum spent is $1300 (13 x $100). He went for treatment by bonesetter twice, spending $1800 on each occasion. I accept his evidence. So for item (a) the total sum to be awarded is $6,700. There is no documentary evidence to support item (b). So there is no documentary evidence to show the breakdowns of $54,000. There is no reason he should seek medical treatment in China, but not in the public hospitals in Hong Kong, where the medical expenses would be minimal. The Plaintiff was not able to give any explanation as to why he did not have receipts for this figure. This court is unable to make a proper assessment of this figure. So claims (b) and (c) are not allowed.
2. The Defendants comment that there is no documentary proof in support of items (e) and (f). There cannot be documentary proof for (e), as the accident took place suddenly. Certainly the Plaintiff needed a wheelchair for his daily activities after his discharge from hospital, so he must have acquired and used a wheelchair at the material time. Even though there is no document to support the purchase of wheelchair, I would allow the claim for this item. I would allow (e), (f) and (g). I would allow $4,000 for item (h) and $2,000 for (i). She also spent $160 for buying a walking frame. The total miscellaneous expenses allowed are items (a), (d), (e), (f), (g), (h), (i), (j) and $160, making up a total sum of $16,908 ($6,700 + $1,200 + $500 + $1,100 + $48 + $4,000 + $2,000 +$ $1,200 + $160). The total sums allowed is $30,308 ($10,400 + $3,000 + $16,908).

Cost of Future Treatment

1. Dr. Fu advised that the Plaintiff should undergo an implant removal operations as there was screws impingement. His present wish is that he would hope to undergo the implant removal operation if he has the financial means. The cost of surgery is claimed at $30,000, if done in the private sector, as advised by Dr. Fu. But he can have the operation done in public hospital for a much lesser cost. I would only allow $3,000 for this item.
2. A summary of award to be made in the Plaintiff’s favour are set out as follows:-

(A)

PSLA $350,000

Pre-trial loss of earnings & MPF $477,750

Future loss of earnings & MPF $163,800

Misc. expenses/special damages $30,308

Future medical expenses $3,000

$1,024,858

1. The Plaintiff has received employee’s compensation in the sum of $54,123.12. This sum has to be deducted from $1,024,858. Hence the award payable to the Plaintiff is $970,734.88.
2. I order that the Defendants jointly and severally pay the Plaintiff the sum of $970,734.88 within 14 days from today, with interests thereon, interest on $350,000 at 2% p.a. from 9.7.2005 up to today, interests on $453,934.86 ($477,750 + $30,308 - $54,123.12) at 50% of judgment rate from 10.7.2002 until today; interest on $970,734.88 at judgment rate from 20.6.2008 until satisfaction.

Costs

1. I make an order nisi, to be made absolute in 14 days’ time, that the Defendants do pay costs of these proceedings to the Plaintiff, to be taxed, if not agreed, with Certificate for Counsel. The Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.
2. Since the Defendants are to bear equal liability towards the Plaintiff’s injuries. So as between themselves, they have to share the above-said payments and costs equally.

(S. Chow)

District Judge

The Plaintiff : represented by Miss Phillis Lok, instructed by M/S. Lily Fenn & Partners.

The 1st and 2nd Defendants : represented by Mr. C.K. Wong, instructed by M/S. Deacons, Solicitors.