DCPI 1507/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1507 OF 2006

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BETWEEN

FUNG SHUK FAN CINNIE Plaintiff

and

LAND FORTUNE LIMITED Defendant

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Coram : His Honour Judge Stanley Chan in Court

Dates of Trial : 25th, 26th, 27th, 30th of April and 14th May 2007

Date of Handing Down Judgment : 27th July 2007

**J U D G M E N T**

# Background

1. The Defendant is a film production company and the Plaintiff worked for the Defendant as the Assistant Art Director in a film, later known as ‘New Police Story’ (‘the film’). The Defendant rented the rooftop of the Convention Plaza Apartment (‘Building’) in Wanchai for the purpose of shooting part of the film. The rooftop is a strictly restricted area to any visitors. There is no fence and railing along the edge of the Building and there are a number of voids of different sizes on the rooftop: re the photos at pp.134 to 135 and pp.194 to 199 of the bundle and the sketch plan at p.71 of the bundle [Exhibit P-1]. All the voids and the edge of the Building have curbs which are painted in bright yellow colour. At intervals, there are hazard notice painted in yellow on the ground. Some voids are big. Underneath some of these big voids, there are the rooftop gardens of the penthouse residents of the Building. Beneath those voids of smaller size, there are some concrete pipes and metal objects. Along the edge of the Building are the outer and inner metal rails which are about 16 inches from the ground of the rooftop and are 3 feet apart between these two rails. These metal rails are installed for the use of window cleaner machines.
2. In the afternoon of 5 November 2003, the Plaintiff was asked to attend the scene to install a series of spotlights along a portion of the edge of the rooftop of the said Building. After obtaining confirmation from Wong Ching Ching, the Art Director of the film, the Plaintiff then instructed a Prop team to purchase the spotlights. It was the first time for the Plaintiff to visit the rooftop of the Building. The Plaintiff was the only representative of the Art Department and assumed a supervisory role. She had about 4 to 5 persons under her supervision. At about 6:30 pm, after dinner, the Plaintiff supervised the setting up of 12 spotlights which were to be installed on the ground outside the outer metal rail. There are some 7 smaller voids located between the outer and inner metal rails. Whilst the Plaintiff was supervising the setting up of the spotlights, she stepped into one of the void openings, which measures 1.5 meters x 1.2 meters in size, on the Southwest side of the Building. The Plaintiff fell 6 meters down from the top and landed on top of the pergola of the penthouse garden of Unit 4608 on 46/F of the Building. The Plaintiff was unconscious and was rushed to the hospital.
3. At the time of the accident, the Plaintiff was in 8-week pregnancy and sustained injuries from the fall. She suffered fracture of the left mandible, facture of the left acetabulum and fractured dislocation of left wrist. The Plaintiff was hospitalized till 29 November 2003 and had to receive therapeutic treatments. The Plaintiff was assessed to have suffered 2% of whole person impairment for the injury to her left hip and 1% of whole person impairment for the injury to her left wrist [pp.116 to 124 of the bundle]. Fortunately the pregnancy of the Plaintiff was not affected adversely.
4. Prior to the commencement of the hearing, the Plaintiff applied for leave to file the Amended Statement of Claim to cover the failure on the part of the Defendant to provide sufficient lighting. It was objected by Counsel of the Defendant as it was too late for them to prepare rebuttal evidence against the allegation. After taking instruction, Counsel for the Plaintiff decided to withdraw the application and rely on the original Statement of Claim. Counsel for the Defendant also asked for a joint site visit of the scene which was done in the afternoon of 26 April (Thursday).

**Agreed Quantum**

1. Prior to the commencement of the proceedings, both parties agreed the quantum to be $530,000, inclusive of interest. A sum of $88,431.70 had been given to the Plaintiff by the Defendant and the net sum outstanding is $441,568.30 if the issue of liability is found in the Plaintiff’s favour.

# The issues

1. The Plaintiff’s causes of action are:

(1) Breach of employment contract; and/or

(2) Occupier’s liability; and/or

(3) Negligence

**The Plaintiff’s case**

1. The Plaintiff gave evidence in court. She adopted her witness statement dated 14 February 2007 [pp.51 to 60 of the bundle]. The Plaintiff said that she started to do the art work in the film industry since 1999. In August 2003, the Plaintiff was asked by Madam Wong Ching Ching to assist her in the art work for the production of a movie called ‘New Police Story’. The Plaintiff was offered a monthly salary of HK$18,000.
2. The Plaintiff started to work for the Defendant at the end of September 2003. She was required to sign a Contract in Chinese [pp.126 130 of the bundle]. The contract bears the letterhead of Land Fortune Limited and it was described as ‘self-employee contract’. The Plaintiff was engaged as an Assistant Art Director providing assistance to the Art Director of the Defendant. It was the understanding of the Plaintiff that some film production companies used this kind of self-employment contract to avoid paying the Mandatory Provident Fund (‘MPF’) contribution. The job was expected to complete on or about 22 November 2003 and the Plaintiff was entitled to have a pro-rata payment of the monthly salary and $15 per hour for any overtime work. The Plaintiff was engaged on a full time basis and was not allowed to work for other companies or engaged in other work during the contractual period. If the job could not be completed on 22 November 2003, the Plaintiff was required to continue to work for the Defendant. The Plaintiff was not required to provide her own tools and equipment for the purpose of the contracted job. The tools and equipment were provided by the Defendant. For any materials that were required for the art work, approval had to be sought from the Art Director and the expense would be reimbursed. The Plaintiff received instructions from the Art Director or other senior staff members of the Defendant as to the type of work to be done and the place of work. The Plaintiff was not required to hire any workers as the workers would be provided by the Defendant. Her salary was fixed and could not earn profit or dividend. The Plaintiff was not required to bear any financial risk. Nor was she required to set up a company.
3. In this film project, there were 2 joint Art Directors (including Madam Wong), and under their supervision, there were 3 Assistant Art Directors, including the Plaintiff. They had different responsibilities in different parts of the Art works for the production of the film. The Plaintiff was assigned mainly to do the setting-up job at the scene. From time to time during the contractual period, Madam Wong gave instructions to the Plaintiff as to how the shooting scene was to set up. The Plaintiff needed to seek Madam Wong’s approval for those plans for the shooting scenes. Regular meetings were held with Madam Wong and other directors of different sections for the film production. In the Art Section, there was a Prop Department which would assist the Plaintiff in setting up the scene as planned. The staff of the Prop Department worked for the Defendant.
4. On 4 November 2003, the Plaintiff was asked by Madam Wong to go to the rooftop of the Building to supervise the Art work for film shooting on the following day.
5. The Plaintiff went to the said rooftop at about 6:30 pm on 5 November 2003. She was told by the Photography Director to install a series of spotlights along a portion of the edge of the Building. She instructed the Prop team to buy the spotlights. At around 7:00 pm, they started to set up the spotlights in accordance with the instructions of the Photography Director. It was getting dark. The Plaintiff needed to walk along the edge outside the gondola runway [see photos at p.134]. In court, the Plaintiff was asked and made a red mark on the photo at p.134 which was exhibited as P-2. The Plaintiff was of the view that the two voids could have been covered by wooden plank. There were no fencing, railing, barrier or safety net along the voids opening. Whilst the Plaintiff was supervising the setting-up work, she stepped into one of the two smaller voids of about 1.5 meters x 1.2 meters. She landed on top of the pergola of the garden of a penthouse unit which was 6 meters down from the top of the void opening. She was unconscious and was rushed to Ruttonjee and Tang Shiu Kin Hospital. Later she was transferred to Pamela Youde Nethersole Eastern Hospital. She was in 8-week pregnancy and was found to have multiple fractures. Several operations were performed. The Plaintiff was hospitalized for a total of 24 days and was discharged on 29 November 2003. On or about 29 March 2004, the Plaintiff received a total sum of $88,431.70 from the Defendant, being her salary during the sick leave for the period from 6 November 2003 to 31 December 2003.
6. Under cross-examination, the Plaintiff said that the fall from the void opening was an accident and she could not remember how it happened. She lost memory about the process of her fall. She took a ‘mis-step’ and fell down from the void opening. It was the first time the Plaintiff went to the rooftop of the Building. At the scene, the Photography Director asked her to set up 12 spotlights. The Plaintiff had to call Madam Wong to ascertain the position. Once the position was confirmed, the Plaintiff instructed the Prop team members to buy 12 spotlights. As it was time in November, the sky got dark quickly. The Plaintiff considered that it was not the responsibility of the Prop team to take care of the safety issue, and safety measures, if any, should not be done on the spot on the day. She read the script of the film on the day before the shooting and hence knew in general terms the story of the film. The Plaintiff disagreed with Counsel for the Defendant that it was not possible to erect fence along the voids because it would hamper shooting of the film. The Plaintiff mentioned that if the void openings were covered as depicted in the photo No.6 at p.197, it would not affect the shooting. The Plaintiff was also of the view that if movable cones were to be set up, it could be done by ‘Set PA’ and the Prop team was required to be involved.
7. Counsel for the Defendant asked for a site visit on the first day of the proceedings. Despite objection from Counsel for the Plaintiff, I have granted leave to have a site visit which was done in the afternoon of 26 April 2007 and it was in the process of the cross-examination of the Plaintiff. Cross-examination of the Plaintiff resumed shortly after the site visit.
8. Under cross-examination, the Plaintiff said that before the setting up of the spotlights, someone at the scene did remind those present to “be careful with yourself and be cautious that you may fall”. The Plaintiff remembered that at that time, some people were making use of the opportunity to take photos of the Victoria Harbour but the photo-taking activity was not work-related. Ringo Chan, Assistant Production Manager, did warn those crew members on the rooftop not to stand outside the rail when taking pictures of the harbour.
9. The Plaintiff also showed 9 of her previous contracts which were labelled as working staff contract and/or employed staff contract. One of these contracts has a provision relating to the contribution to MPF.

**Defence’s case**

1. The Defendant called 2 witnesses to testify: DW1 Tung Wun Sze Barbie (pp. 78 to 81 of the bundle) and DW2 Chan Chi Hin, Ringo (pp. 62 to 77 of the bundle).
2. DW1 Tung worked as a film producer of the film and was responsible for managing the finances and logistics of making the film. The Plaintiff was engaged as the Assistant Art Director pursuant to a written agreement with the Defendant dated 1 October 2003 (pp. 83 to 87 of the bundle). It was said that the said agreement was a standard agreement commonly used by the film industry in Hong Kong. DW1 regarded the Plaintiff worked for the Defendant as an independent contractor with a salary of $18,000 per month. DW1 was not present when the accident occurred on the rooftop of the Building. Subsequent to the accident, she recommended the Defendant to continue paying salary to the Plaintiff and to shoulder the latter’s medical expenses. The Plaintiff was still considered as part of the production team, even though she could not perform her duty after the accident. By a letter dated 25 March 2004 issued by the Defendant (pp.89 and 90 of the bundle), a sum of $88,431.70 was given to the Plaintiff as a gesture of good will and was paid on a without prejudice basis. No admission of liability was made by the Defendant and, by the same token, the Plaintiff also accepted the said sum on a without prejudice basis. DW1 mentioned that in the film industry, the Production team was in charge of the overall safety aspect. The Defendant did not ask for a substitute, even though the Plaintiff could not perform her duty after the accident.
3. DW2 was called. He adopted his witness statement and told the court that he worked for the Defendant as the Assistant Production Manager in this film production. DW2 had not assessed the safety aspects of the rooftop of the Building before the film shooting. It was the responsibility of the Production Department of the Defendant to take care of the safety issues. DW2 said that at the time of shooting, he did tell people on the rooftop not to go near the voids, but if they were required to work in that area then it was permissible for them to go there. He knew that the Plaintiff was required to move around near the voids to perform her job. The area was lit by the main lighting system which was not the responsibility of the Art Department. He considered that there was sufficient lighting at the time to enable people to avoid the voids. DW2 clarified what he had stated in para.8 of his statement (at p.64 of the bundle) when he said “after the accident, I followed Cinnie [the Plaintiff] to the hospital. … She said that she was putting the lights along the wall next to the voids when she accidentally stepped back into one of the voids.” DW2 said that the above conversation was made by the Plaintiff when the latter was discharged from the hospital, not when the latter was rushed to the hospital.
4. In the statement to the Labour Department dated 10 November 2003, DW2 confirmed that the Defendant did not make any safety or risk assessment of the rooftop before the shooting (p.67 of the bundle). Nor was there any warning notice posted up at the scene. The voids were not covered because the position of the camera might have to be changed from time to time (p.69 of the bundle). They did not set up or impose any other safety measures to protect people working on the rooftop (p.70 of the bundle). He said that no one on the day asked him to cover the voids or set up any fence along the edge of the Building. DW2 however was not responsible for the safety of crew members on the spot. In his statement to the Labour Department, DW2 further stated that “the film production company (Land Fortune) does not have a team which is particularly responsible for the safety matters of the staff working on the rooftop, it mainly relies on the staff’s own safety awareness.”: para.3 at p.66 of the bundle. He agreed, under cross-examination, that from hindsight, had the voids in question been covered, the Plaintiff would not have fallen down from the void opening on that day. He agreed that in the course of setting up the spotlights, the voids could be covered by wooden planks. It would not require drilling of holes as a temporary measure to fix the planks.

# Analysis

**(I) Whether the Defendant is liable on the basis of a breach of employment contract**

1. The Defendant denied that the Plaintiff was its employee at the material time. It relies on the written contract dated 1 November 2003 signed by both parties (pp.126-130 of the bundle). It was labelled as ‘self-employee contract’ and the contract was for the period between 1 October 2003 and 22 November 2003. The Plaintiff was required to work full time for the Defendant exclusively. The Defendant would assign works for her to do. The Plaintiff could not work for a third party, including charitable work, in whatever form and nature. It was specifically stated that the Plaintiff worked as a self-employed person providing services to the Defendant. The Plaintiff would not be regarded a partner or an agent for the Defendant nor were both parties in joint enterprise. The Plaintiff was required to shoulder her own tax responsibility, labour insurance and MPF (clause 3 of the contract at p.127 of the bundle). A specified sum of $31,200 was mentioned. Upon expiry of the contractual period, if requested by the Defendant, the Plaintiff would be required to continue working for the Defendant in this film production until it was completed, and the salary would then be calculated on a pro rata basis. The Defendant could instruct the Plaintiff to work either in Hong Kong or overseas (clause 8 of the contract at p.128 of the bundle). If the Plaintiff was required to work overseas, the expenses would be borne by the Defendant (clause 9 of the contract).
2. It is well established that a contract, even though labelled as a self-employment contract, is not conclusive in determining the legal relationship between the parties concerned. In Lee Ting-sang v Chung Chi-keung and another [1990] HKLR 764 at p.766-G, when considering the standard to apply for determining if a person worked as an employee or as an independent contractor, Lord Griffiths was of the view that:

“This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to device a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke, J at pages 184 and 185 in Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173: “This fundamental test to be applied is this: ‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account?’ If the answer to that question is ‘Yes’, then the contract is a contract for service. If the answer is ‘No’, then the contract is a contract of service. … The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor, and that factors which may be of importance are such matter as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.’ ”

1. The approach elucidated in the Market Investigations case was adopted by the Court of Appeal in Chan Kwok-kin v Mok Kwan-hing and another [1991] HKLR 631 at p.636-A where the Court of Appeal said “it was for the Court and not the applicant to evaluate the facts and determine the legal relationship of the applicant to the respondent. The applicant no doubt knew who he was working for … but in all the circumstances we think his classification of their legal relationship and of his legal relationship with Law can have no significant evidential value.”
2. In the present case, when deciding if the legal relationship between the Plaintiff and the Defendant was one of contract for service or contract of service, the following factors are taken into account:

(i) the Plaintiff was required to work in full time and exclusively for the Defendant during the specified contractual period and the Plaintiff could not work for a third party, not even for any charitable job.

(ii) the Plaintiff was engaged by Defendant with a monthly salary of $18,000 and would be paid $15 per hour for any overtime. Even if the contractual period was expired, the Plaintiff was required to work for the Defendant if the latter asked for that.

(iii) the Plaintiff was under the control of the Defendant in various aspects: the Plaintiff had to guarantee that she was free from any other contractual obligations and had to fulfill her obligations under the contract; that she had to work for the Defendant solely and exclusively; that she could not work for a third party at the same time (clause 2 of the contract); that if requested, she needed to work for the Defendant after the expiry of the contractual period (clause 4(b) of the contract); that the Plaintiff was required to follow the instructions of the senior staff of the Defendant or the film director (clause 7 of the contract); that the Plaintiff was required to inform the Defendant of her location so that she could be reached by the Defendant at whatever the time (clause 8 of the contract); that the Defendant was allowed to instruct the Plaintiff to go to any place in Hong Kong or overseas and the expenses related thereto would be borne by the Defendant; that prior approval from the Defendant needed to be sought before taking sick leave with proper medical proof (clause 13 of the contract).

(iv) the Plaintiff was not required to provide her own equipment.

(v) the Plaintiff was not required to hire her own helpers.

(vi) the Plaintiff was not required to take any financial risk, nor did she have to bear any degree of responsibility for investment and management.

(vii) the Plaintiff did not have the opportunity of profiting from sound management in the performance of her task.

(viii) the Plaintiff was not required to set up a business entity to perform her tasks.

1. It is established that control is not to be taken as the sole determining factor. In Poon Chau Nam v Yim Siu Cheung trading as Yat Cheung Air-conditioning & Electrical Co., FACV 14 of 2006, at p.7 of the judgment, Riberio PJ held that:

“while control (broadly conceived) continues to be regarded as one of the indicia of employment, the courts have increasingly turned to the economic or commercial aspects of the relationship as more suitable guides to the allocation of such statutory rights and duties. Thus, in the Privy Council in 1947, having pointed to the inadequacy of control as a single test, Lord Wright stated: “In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss.”

1. The question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded as a question of fact to be determined by the trial court: Lee Ting Sang v Chung Chi Keung [1990] 2 AC 374 at 384.
2. In the present case, the factors abovementioned, no doubt, lend weight to the Plaintiff’s argument and support the conclusion that the Plaintiff was an employee of the Defendant at the material time, and there existed a legal relationship of employer and employee between the parties. The contract signed between the parties could not be taken as conclusive in determining the actual legal relationship. The fact that the Plaintiff labelled herself as a self-employed person and had to bear the costs for insurance and MPF could not exonerate the Defendant’s liability as the Plaintiff’s employer. I find that the actual relationship between the Plaintiff and the Defendant was that of employer and employee and there existed a contract of service.
3. As I accept that the Plaintiff was the employee of the Defendant at the material time, it follows that the Defendant owed the Plaintiff a personal and non-delegable duty to take reasonable care for the safety of the Plaintiff. As an employer, the Defendant was under obligations to its employees to provide for their safety. The employer may delegate the carrying out of such obligations, but it cannot delegate or avoid its own responsibility for their proper performance, and one of the obligations is to provide a safe system of working. It was held by the House of Lords in Winter v Cardiff Rural District Council [1950] 1 All ER 819 that:

“The duty to provide a safe system of working is not absolute, but only to do his best to fulfill the obligation imposed on him, though, indeed, a high standard is exacted. That duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. … The duty of the employer is to act reasonably in all the circumstances. … Where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. … The giving of proper instruction may well be a part of a proper system of working, and the omission to give them may constitute a defect in the system of working, or alternatively, a breach of the employer’s obligation to take reasonable steps for the safety of those employed on the task.”

1. In the present case, there was no evidence to suggest that proper instructions were given to those crew members and the Plaintiff working on the rooftop at the material time. The most that could be said about proper warning was when Ringo Chan said to those people who were taking photos of the Victoria Harbour to be careful but that was unrelated to the shooting. The rooftop of the Building is a place of danger as there is no fence along the edge of the Building and, in this present case, there are a number of voids. One of the tasks of the Plaintiff was to supervise the setting-up of the spotlights and these crew members were required to set the spotlights along the metal rails as depicted in the sketch plan (Exhibit P-1).
2. It is my judgment that it should be the responsibility of the Defendant to install a proper safe system of working in the circumstances. Proper instructions should be given to those workers working on the rooftop when it was inherently dangerous to work there. It is also reasonable, in my view, for the Defendant to cover the smaller voids with wooden planks or objects, or at least, part of the voids, before making the shooting. Removable fences or plastic tapes could be installed or displayed so that it can be taken as a warning device to remind people of the hazard. I do not accept that these safety measures are not practical or costly as suggested by Counsel for the Defendant. The Production Department of the Defendant which was responsible for the safety issue, could have made the proposal and taken steps to install these safety measures or some of them when site visits for choosing shooting scenes were made.
3. I find that when the system or mode of operation is highly dangerous, such as setting up spotlights on the rooftop along or near the edge of a tall building like the present case or shooting involving dangerous acts, the whole operation should require proper organization and supervision with a reasonable safe system. The higher the danger, the higher standard of organization and supervision is expected. As said by Keith JA in Wong Wai Ming v Hospital Authority [2001] 3 HKLRD 209 at 212-G,

“An employer is under a duty to its workforce to take reasonable care for their safety. Where one employment happens to be more dangerous than another, a greater degree of care must be taken, but where the employer cannot eliminate the risk of danger, it is required to take reasonable precautions to reduce the risk as far as possible. … However, an employer is not required to take reasonable precautions to remove every risk which might confront its workforce. In a classic statement of the relevant principles, Lord Reid said in The Wagon Mound (No.2) [1967] AC 617 at pp.642E – 643A:

‘… it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of … a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it … [T]he general principle [is] that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. … [I]t is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.’

These principles have been applied to the employer’s duty to protect its workforce from attacks while they carry out their duties.”

1. The principles abovesaid have also been applied in Yeung Tung Sang v Jamsart Cleaning Service Co Ltd & another [2004] 2 HKLRD 54 where it was held that the test for whether an employer had taken reasonable care for its employee’s safety was whether it had taken reasonable precautions in all the circumstances paying a proper regard to the risks.
2. In the present case, I find the Plaintiff was injured arising out of and in the course of her employment with the Defendant. The Defendant failed to take reasonable precaution to reduce the risk which the Defendant knew or ought to know was a real risk which was not small at all. The Defendant clearly was in breach of its employer’s duty to provide a safe system of work to the Plaintiff.

**(II) Whether the Defendant is liable under the Occupiers’ Liability**

1. If not the Plaintiff’s employer, the Defendant is certainly liable to the Plaintiff as the occupier of the rooftop of the Building at the material time. To be an occupier of a site within the terms of the Occupiers Liability Ordinance, Cap 314, it is not necessary for the occupation to be exclusive. In Halsbury’s Laws of Hong Kong Vol 25 para [380.121], it is stated that:

“To be an occupier it is not necessary for the occupation to be exclusive, and the test is whether a person has a sufficient degree of control associated with and arising from his presence in and use of or activity in the premises.”

1. At para [380.122], the author further stated that:

“The approximate distinction between invitees and licensees was that an invitee was requested to enter the premises in the interest of the occupier, whereas a licensee was merely permitted to enter. The extensive case law on the distinction between the two is no longer important because ‘visitor’ for the purposes of the Occupiers Liability Ordinance embraces those persons who are invitees or licensees at common law, that is, anyone to whom the occupier gives any invitation or permission to enter or use the premises.”

1. In addition, the authors of Clerk and Lindsell on Torts (19th ed.)(2006) at p.744 also stated:

“… a person is likely to be regarded as an ‘occupier’ if he has a sufficient degree of control over premises to be able to ensure their safety, and to appreciate that a failure on his part to use care may result in injury to a person coming on to them. The control need be neither entire or exclusive. So someone with the immediate supervision and control of premises … may be an occupier, whether or not he has the power of permitting or prohibiting the entry of other persons to it.”

1. In the present case, the rooftop is a private property which was not open to public. The Defendant rented the rooftop for a few hours for the purpose of film shooting. Activities on the rooftop at the material time were regulated and supervised by the Defendant via its staff or agents. The Plaintiff was clearly a visitor under the Occupiers Liability Ordinance, Cap 314, and the Defendant, being an occupier of the site, failed to discharge the common duty of care to the Plaintiff. I do not accept that there exists a positive duty on the visitor to avoid risks under section 3(3)(b) of Cap 314. All that is required for the visitor under the said sub-section is for the visitor, in exercise of his or her calling, would appreciate and guard against any special risks ordinarily incident to it. The Plaintiff was tasked to supervise the setting-up of the spotlights near the edge of the Building. Not only the Plaintiff, in fact, all the crew members were exposed to the apparent risk of falling down from the height. To some extent, the Plaintiff was fortunate in that she did not suffer serious or permanent injury and that her pregnancy was not affected. No special or even reasonable safety measures were in place and no one at the scene on the day was tasked with the specific duty to ensure those crew members working on the rooftop were reasonably safe. As held by Kaplan J in Wong Chi Shing v Argos Engineering & Heavy Industries Co Ltd & others [1993] 1 HKC 598,

“A person who intends that others shall come upon property of which he is the occupier, for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and the appliances which are used in the work are fit for the purpose to which they are to be put. He does not discharge this duty by merely contracting with competent people to do the work for him.”

In the present case, no competent people, if any, were contracted to discharge this duty on the rooftop at the material time.

**(III) Whether the Defendant is liable on the basis of negligence**

1. I have ruled that the Defendant is liable for the injury sustained by the Plaintiff in this action on the basis of both a breach of employer’s duty and that of the occupier’s liability. Strictly speaking, there is no need for me to address to the issue of negligence, being the third cause of action of the Plaintiff. In my judgment, the Defendant is also liable under this third cause of action. Given the Plaintiff’s job nature and the necessity for the Plaintiff to take instructions from agents of the Defendant, it is without doubt that there was a close relationship between the Plaintiff and the Defendant which established the requisite degree of proximity. The Defendant owed a duty of care to the Plaintiff and accordingly should have taken reasonable care to avoid acts or omissions which could cause injury to the Plaintiff. The injury caused to the Plaintiff was the direct and natural consequences of the Defendant’s breach of duty as the latter failed its duty to set up safety measures and provide adequate warnings to prevent those workers working on the rooftop from falling through the void opening. In the circumstances, the Defendant clearly is also liable for breach of the common law duty of care it owed to the Plaintiff.

# The issue of contributory negligence

1. Contributory negligence means that there has been some act or omission on the claimant’s part which has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence, and that applies solely to the conduct of a claimant: para.3-03 at p.194, Charlesworth & Percy on Negligence (11th ed)(2006).
2. The authors of Charlesworth & Percy on Negligence (supra), at para.3-12 of p.197, also mentioned that:

“The burden of proving contributory negligence is on the Defendant; it is not for the claimant to disprove it. ‘If the defendants’ negligence or breach of duty is established as causing the damage, the onus is on the defendants to establish that the claimant’s contributory negligence was a substantial or material co-operating cause.’ Further ‘in order to establish the defence of contributory negligence, the defendant must prove first, that the Plaintiff failed to take ‘ordinary care of himself or, in other words, such care as a reasonable man would take for his own safety, and secondly, that his failure to take care was a contributory cause of the accident.’ The amount of care which a claimant may reasonably be expected to take necessarily varies with the circumstances and with the conditions actually prevailing at the material time. It is not necessary, in order to discharge the burden of proof, that the defendant give evidence, because contributory negligence can be inferred from the evidence adduced on the claimant’s behalf or from the primary facts, as found by the court, on a balance of probabilities.”

1. The Defendant argued that the Plaintiff, being an experienced Assistant Art Director, failed to take precautions to avoid going near to or falling from the void opening; that the Plaintiff failed to ensure that the spotlights were installed at a safe distance from the voids; and that the Plaintiff carried out her duties without taking reasonable care for her own safety while doing so (para.6 of the Defence at p.33 to 34). It was argued that the Plaintiff should raise the safety issue with the Defendant or its agent and there is a statutory duty on the Plaintiff to take care of herself under s.3(3)(b) of the Occupiers Liability Ordinance of Cap 314, knowing the existence of the voids on the rooftop.
2. It is beyond dispute that the Plaintiff was instructed by the Defendant to go to the rooftop to work and the spotlights were installed as per instruction of the Photography Director or agents of the Defendant. The setting-up was to facilitate the shooting of certain dangerous acts done by the actors. It was accepted that the issue of safety was the responsibility of the Production team, and was not the responsibility of the Plaintiff. It was submitted by Counsel for the Defendant at her closing submission that there was no reason given by the Plaintiff as to her failure to inform other person to cover the two voids in question. It was submitted that the Plaintiff could have done so and could easily achieve that. I do not accept this kind of proposition. If such an argument can be sustained, it should apply to the Production Department of the Defendant which has one of the important responsibilities of ensuring working safety for its workers. The Defendant should be aware of the hazardous working environment when the rooftop of the Building was chosen for shooting. The rooftop was chosen for particular purposes, inter alia, to have the Victoria Harbour as the background of the shooting and certain dangerous act would be performed by the actors. The location per se for setting up the spotlights was inherently dangerous. The Plaintiff had a ‘mis-step’, be it a step forward or backward, and that was an accident. There is no evidence to suggest that the Plaintiff, in the exercise of her calling, did not guard against special risks ordinarily incident to it. In fact, it would be inconceivable that the Plaintiff, being in 8-week pregnancy at that time, did not take extra precaution when working on the rooftop. In Yeung Tung Sang v Jamsart Cleaning Service Co Ltd [2004] 2 HKLRD 54 at p.65-H, Deputy Judge B Fung (as he then was) cited what was said by Denning LJ in General Cleaning Contractors Ltd v Christmas [1953] AC 180:

“You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which his employers expected him to do it and, if they had taken proper safeguards, the accident would not have happened.”

1. In my judgment, the Defendant should be especially vigilant for the safety of those working on the rooftop when the site was chosen. No explicit warning signs were placed around the voids. Nor were there specific oral warnings given to the workers. No attempts were made by the Defendant to cover or fence off the voids in question. It is apparent that the Defendant took no elementary precautions when the shooting was made on the rooftop on that day. The Defendant’s attempt to blame the Plaintiff because she is an experienced Assistant Art Director fails in my judgment. As said by Kaplan J in Chan Sim Lan v Sheen State International Ltd [1994] 1 HKC 460 at 465, “the elementary precautions which should have been taken, but were not, should have been designed to prevent both experienced and inexperienced workers alike.”
2. In all the circumstances, I find the Defendant liable for the injuries sustained by the Plaintiff and can see no basis for reducing the Plaintiff’s damages on the grounds of her own contributory negligence.

# Order

1. Accordingly, I enter judgment for the Plaintiff and award the Plaintiff the agreed quantum of damages in the sum of $530,000 inclusive of interest. As a sum of $88,431.70 has been given to the Plaintiff, the outstanding sum is $441,568.30.

**Costs**

1. I grant an order nisi that the Defendant pays the costs of the action to the Plaintiff, to be taxed if not agreed, with certificate for counsel. And the Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. Such order nisi is to be made absolute 14 days after the date of handing down of this judgment.

(Stanley Chan)

District Judge

Representation:

Mr. Walker Sham instructed by Messrs. Peter W.K. Lo & Co. assigned by DLA for the Plaintiff.

Mrs. Dora K.H. Chan instructed by Messrs. Fred Kan & Co. for the Defendant.