## DCPI 1724/2016

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1724 OF 2016

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##### BETWEEN

CHOW SHEK PING Plaintiff

and

LAI SHING CONSTRUCTION ENGINEERING 1st Defendant

LIMITED

GLORY SKY CONSTRUCTION LIMITED 2nd Defendant

CHEUNG KEE FUNG CHEUNG CONSTRUCTION 3rd Defendant

COMPANY LIMITED

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Before: His Honour Judge MK Liu in Court

Dates of Hearing: 23-24 & 26 May 2017

Date of Judgment: 1 June 2017

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JUDGMENT

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1. The plaintiff injured in an accident (“the Accident”) occurred at the stairwell between the 5th and the 6th floor of the building at 12-14 Hung Kwong Street (“the Building”), To Kwa Wan, Kowloon, Hong Kong on 20 September 2012.
2. The plaintiff sues the defendants for damages for personal injuries sustained as a result of the Accident. At the time of the Accident, the 3rd defendant was the main contractor of the construction works at the Building, the 2nd defendant was the sub-contractor of the 3rd defendant, and the 1st defendant was the sub-contractor of the 2nd defendant.

*The plaintiff’s case*

1. The plaintiff says that:-
2. He was employed by the 1st defendant as a construction site worker at the Building. On 20 September 2012, he was assigned by one Lai Kwok Lun (“Lai”) of the 1st defendant to carry out plastering of the ceiling (“the Task”) at the stairwell between the 5th and 6th floors of the Site (“the Location”).
3. In order to perform the Task, he had to stand on a platform (“the Platform”) provided by the defendants.
4. The Platform consisted of one piece of spring board of approximately 7 to 8 inches wide and 6 to 7 feet long (“the Board”). One end of the Board was supported by a wooden ladder on the stairwell, and the other end was placed on top of a step of the ascending staircase. The Platform was approximately 1.5 meters above the floor of the stairwell.
5. The plaintiff was carrying out the Task by himself. The 1st defendant did not assign another worker to assist him.
6. At that time, the plaintiff was wearing a safety helmet which was strapped on properly, holding a mortar board and a trowel, and was wearing a pair of safety shoes with rubber soles, but the defendants did not provide any safety belt.
7. While carrying out the Task, the plaintiff lost his balance. He fell off the Platform and landed on the floor of the stairwell. The Platform collapsed immediately after the fall of the plaintiff.
8. For ease of reference, the plaintiff’s version of the Accident is called “the Platform Version” in this judgment.
9. The plaintiff claims that the Accident was caused by the negligence, breach of contract of employment, breach of common duty of care as occupier of the Building, breach of the statutory duty under the Factories and Industrial Undertakings Ordinance, and/or breach of the statutory duty under the Occupational Safety and Health Ordinance.
10. As to quantum, the plaintiff claims the following:-
11. PSLA – HK$250,000
12. Pre-trial loss of earnings – HK$928,305
13. Loss of earning capacity – HK$60,000
14. Special Damages – HK$14,470
15. The plaintiff has received HK$552,000 under the Employees’ Compensation Ordinance (“the ECC Award”) in DCEC 1762/2014. The plaintiff agrees to give credit to the ECC Award.

*The defendants’ case*

1. The defendants say that the plaintiff was not employed by the 1st defendant but by a Law Yuk Wah (“Law”). The Accident took place when the plaintiff was descending a flight of stairs at the Location and was carrying materials for the plastering work, the plaintiff missed a step and fell down. The Accident was solely caused by the carelessness of the plaintiff. The defendants’ version of the Accident is called “the Non-Platform Version” in this judgment.
2. Even if liability is established, the defendants say that there should be very substantial contributory negligence.
3. As to quantum, the defendants’ position is as follows:-
4. PSLA – not more than HK$100,000
5. Pre-trial loss of earning – should be HK$118,998
6. Loss of earning capacity – nil
7. Special damages – the figure claimed by the plaintiff, ie HK$14,470, is accepted

*The evidence*

1. The plaintiff has filed a witness statement made by him and has given evidence at trial. I refuse to accept the plaintiff’s evidence as per his witness statement and his oral evidence given at trial, and I do so for the reasons set out in paragraphs 20 to 31 below.
2. The defendants have filed 2 witness statements:-
3. Witness Statement of Lai, a director of the 1st defendant; and
4. Witness Statement of Ngai Si Leung (“Ngai”), a director of the 2nd defendant.
5. Just a few days before the commencement of the trial, the defendants made the following 2 ex parte applications (“the 2 ex parte applications”):-
6. an ex parte application made on 15 May 2017 for a writ of subpoena *ad testificandum* to compel Ngai to attend the trial to give evidence;
7. An ex parte application made on 22 May 2017 for a writ of subpoena *ad testificandum* & *duces tecum* to compel Lai to attend the trial to give evidence and to produce the original of a provisional agreement dated 27 April 2012 (but signed on 24 April 2012) between the 1st defendant and Law in relation to contract no B3/BD/2010 (“the Provisional Agreement”).
8. I granted the 2 ex parte applications. However, at the trial, Mr Sakhrani informed the court that the defendants elected not to call Lai and Ngai. Accordingly, Lai and Ngai have not given evidence at the trial, and the original of the Provisional Agreement has not been produced.
9. I decline to attach any weight to the statements contained in Lai’s witness statement and in Ngai’s witness statement. Lai and Ngai have not confirmed the truthfulness and correctness of their respective witness statements on oath at trial. They have not been subjected to cross-examination. In these circumstances, it would not be appropriate to give any weight to their witness statements.
10. Similarly, I decline to attach any weight to the Provisional Agreement. What has been produced by the defendants is only a copy of the Provisional Agreement. Mr Sakhrani tells this court that the defendants’ legal representatives have not seen the original. Without having the opportunity to see the original, one does not know whether the copy produced is a true copy of the original. Further, by merely looking at the copy produced by the defendants, one does not know whether the Provisional Agreement is related to the construction works at the Building or not. A further point is that the document is from Lai. When the plaintiff has no opportunity to cross-examine Lai, it would not be fair to the plaintiff if any weight is given to this document.
11. Save and except the copy of the Provisional Agreement mentioned above and a “Site Employee Accident Record Form” dated 3 October 2012 prepared by Alfred Chow, the safety officer of the 3rd defendant (“the Accident Record Form”), the parties have no dispute as to the authenticity of the documents and the photos in the trial bundles and a video surveillance produced by the defendants. I have considered these documents and photos and the video surveillance.
12. In the evidence, there are 2 medical reports prepared by Dr Yu Yuk Ling (“Dr Yu”, the defendants’ expert), both dated 31 December 2013, and a joint medical report (“the Joint Report”) prepared by Dr Edmund KW Woo (“Dr Woo”, the plaintiff’s expert) and Dr Yu dated 22 April 2016. Both Dr Woo and Dr Yu are specialists in neurology. The expertise of each of them is not disputed. I am satisfied that they are qualified to give the expert evidence as set out in the aforesaid reports.
13. The Joint Report is important evidence in this case, in which the 2 experts have set out their joint opinion after reviewing the medical records and examining the plaintiff. The 2 experts agree with each other nearly on all aspects. I would highlight a few points mentioned by the 2 experts in the Joint Report, which would have bearing on the outcome of this case:-
14. Both experts agree that the plaintiff might have suffered a mild soft tissue injury to his neck and low back in the accident. The plaintiff’s own expert, Dr Woo, opined this had resolved without any residual disability. The experts also agreed that the plaintiff might have suffered mild Post-Concussion Syndrome. The experts assessed this accounted for a 1% impairment of the whole person;
15. Both experts agree that the residual impairment as a result of the accident is mild and does not impose any restriction on his activities on daily living;
16. Dr Woo is of the opinion that the duration of sick leave should not exceed 6 months. Dr Yu’s view is that the appropriate duration of sick leave should be 6 months;
17. Dr Woo is of the opinion that the plaintiff has suffered no loss of earning capacity. Dr Yu is of the view that the loss of earning capacity is 1.5%;
18. The experts agreed that the video surveillance showed “There was no sign of any disabling headache, dizziness or neck pain. Overall, Mr Chow presented as a normal person of his age during the period when he was under surveillance,”; and
19. Dr Woo opined that the Post-Concussional Syndrome was mild, the plaintiff’s neurological deficits do not impose any restrictions on his activities of daily living, and “he should be able to resume his pre-accident job as a general labourer on construction sites **with no loss of earning capacity**” (Emphasis added).
20. I have mentioned in the above that I refuse to accept the plaintiff’s evidence. In assessing the plaintiff’s evidence, I bear in mind the principles mentioned by DHCJ Eugene Fung SC in *Hui Cheung Fai and Another v Daiwa Development Limited and Others* (HCA 1734/2009, 8 April 2014), [76] – [82]. I come to the conclusion that the plaintiff’s evidence is not credible and must be rejected.
21. I am of the view that the plaintiff’s evidence concerning the Platform is unsatisfactory and unreliable in many material aspects:-
22. The Platform as described in the plaintiff’s evidence is inherently dangerous. Initially, in the cross-examination, the plaintiff admitted it had occurred to him that it was an obviously dangerous way to work, but later on he claimed it really had not occurred to him that there was a very high risk of falling, notwithstanding that he admitted he had appreciated the Platform was very narrow and provided insufficient foothold.
23. The plaintiff admitted that he had been a construction site worker for more than 33 years. Being an extremely experienced construction site worker, it is inherently improbable that he would in the circumstances not complain to the person who gave these instructions or indeed his colleagues about the dangers of working on the Platform, particularly when it appears the latter might have to do ceiling plastering work as well.
24. If his assertions are true about the Platform provided, it is more probable that he would have devised another way of working to avoid the obvious risk, eg riding on the wooden ladder (an A-shaped ladder) provided.
25. His explanation that there were residents passing made it less likely that the Platform would rest unsecured on the staircase, obstructing it. If the residents had to be accommodated, a 1 metre high simple and safe movable platform built on four legs (akin to a bench) placed near the window and not obstructing the stairs and leaving a passageway on the landing would have been more sensible.
26. When confronted with the improbability of working on the Platform approximately 1.5 metres high, when the ceiling was 2.7 metres and he himself was about 5.8 feet tall (1.76 metres), he said for the very first time that he was squatting on the Platform – this is not in his witness statement and is something entirely new. Regrettably, I have to say this is something invented by the plaintiff in the witness box.
27. According to the Joint Report, the injuries sustained by the plaintiff as a result of the Accident are mild head injury and mild soft tissue injury to the neck and low back. The plaintiff’s evidence cannot properly explain these injuries.
28. The plaintiff claimed that he had a mortarboard in one hand and a trowel in the other hand when he fell. If that is true, there would be no way for him to use his hands to break his fall. Yet, the injuries he sustained did not reveal traumatic upper/lower back contusions or fracture injuries.
29. It is inherently improbable that he was wearing a safety helmet which was strapped on properly, and notwithstanding all these, the helmet fell off from his head during the accident.
30. The Accident Record Form directly contradicts the plaintiff’s case.
31. In the Accident Record Form, it is clearly stated:

“Cause and reason for injury: The injured was assigned with spalling work at the time. While he was “carrying” the material and walking down the staircase, he carelessly “took a false step”, lost balance, fell down and hit his head, causing injury. The injured was immediately accompanied by others to the hospital for checkup and treatment.”

1. In the plaintiff’s witness statement, the plaintiff says that the information in the Accident Record Form is not provided by him. He has never made any report concerning the Accident to Alfred Chow.
2. Just beside “Cause and reason for injury”, there are some handwritten words, which means “information correct”. Immediately below these words, there is a signature in Chinese (Mr Fan, counsel for the plaintiff, accepts that this is a signature). On the face of it, the signature is the plaintiff’s signature.
3. During cross-examination, when the plaintiff was being asked on this document, the plaintiff denied that the signature was his signature. However, it is pertinent to note that the plaintiff has never filed a notice disputing the authenticity of this document. In fact, before the plaintiff making the denial in the witness box, the plaintiff has never in anywhere denied that the signature on this document was his signature.
4. If the signature below “information correct” is not the plaintiff’s signature, that would be a very serious matter, for that would mean that someone has forged the plaintiff’s signature on this Accident Record Form to create an impression that the plaintiff has confirmed the information stated in the report. The Accident Record Form itself would be a forgery. Bearing in mind that the plaintiff is legally represented in these proceedings, the plaintiff or his legal representatives would have certainly picked up this and would have raised this before the commencement of the trial. However, there was a complete silence on this issue before the plaintiff making the denial in the witness box. As to all these, the only reasonable explanation is that the plaintiff’s denial is untrue, and the signature on the Accident Record Form is indeed the plaintiff’s signature.
5. I find that the signature below “information correct” on the Accident Record Form is the plaintiff’s signature. I also find that by putting the signature under “information correct”, the plaintiff has confirmed that the information on the Accident Record Form, including “cause and reason of injury”, is correct. I attach full weight to the Accident Record Form.
6. The plaintiff’s evidence is contradicted by the Accident Record Form and is not credible.
7. The medical records also contradict the plaintiff’s case.
8. In the record (“AED Record”) of the Accident & Emergency Department (“AED”) of the Queen Elizabeth Hospital (“QEH”), the remark “Fell from 5-6 stairs at 11 am” is found. Further, as shown in that record, 1 colleague accompanied the plaintiff in the AED.
9. The head trauma record (“the HT Record”) of QEH concerning the examination conducted at 1420 hours on 20 September 2012 shows the following:-
10. Informant: patient & colleagues
11. “HI on wall corner when going down stairs (4-5 steps)”
12. “Deny preceding dizziness / Chest discomfort”
13. “c/o: headache & dizziness”
14. In the plaintiff’s witness statement, the plaintiff says that all the information in the medical records concerning the Accident is not provided by him.
15. However, according to the plaintiff, he was working alone at the Location. No one was working together with him. Accordingly, save and except the plaintiff himself, no one would know the way in which the Accident occurred.
16. In these circumstances, the information “Fell from 5-6 stairs at 11 am” in the AED Report and the information “HI on wall corner when going down stairs (4-5 steps)” in the HT Report would only come from the plaintiff and not from anyone else.
17. This point is further strengthened by the information on the HT Report as set out in (b)(3) and (b)(4) above. Information of this kind can only come from the plaintiff and not from anyone else.
18. I find that the information concerning the Accident as recorded in the aforesaid medical records is provided by the plaintiff himself.
19. The Platform Version as suggested by the plaintiff is contradicted by the medical records.
20. As to the way in which the Accident occurred, the Accident Record Form and the medical records corroborate with each other. All these documents contradict the Platform Version suggested by the plaintiff, but supports the Non-Platform Version in the defendants’ case. I find that the Platform Version is untrue, and the Non-Platform Version is the truth.
21. In his witness statement, the plaintiff says that at the time of the Accident, his monthly salary was about HK$22,000. However, in a declaration form signed by the plaintiff for the purpose of claiming employees’ compensation (“the EC Declaration Form”), the plaintiff stated that his monthly income in June, July and August 2012 were HK$20,400, HK$17,000 and HK$22,100 respectively. The average of these figures would be about HK$19,833. The plaintiff has exaggerated him monthly income in his witness statement.
22. In his witness statement, the plaintiff claims that he was unable to find construction site work upon expiry of the sick leave period. He worked as a delivery worker between 22 to 26 September 2015, and started working as a general worker at construction sites since October 2015.
23. However, in the Joint Report, Dr Woo and Dr Yu recorded:-

“He was granted sick leave from 20th September 2012 to 31st March 2015. It was documented in the 17th February 2015 attendance notes of the Neurosurgery Clinic of QEH that he had “*resumed duty already*”. However, he said he returned to work after expiry of sick leave in the summer of 2015. ……” (Emphasis in original)

1. As to when he started to work after the Accident, what has been said by the plaintiff in his witness statement is contradicted by the medical records.
2. I have seen the plaintiff and I have heard his evidence. I am of the view that the plaintiff is an evasive witness and is unwilling to tell the truth.
3. I reject the plaintiff’s evidence as per his witness statement and his oral evidence in its entirety.

*Liability*

1. I have rejected the plaintiff’s evidence and I have found that the Platform Version is untrue. Further, on the basis of the Accident Record Form, the AED Record, and the HT Record, I have found that the Non-Platform Version is true. In these circumstances, the plaintiff has failed to establish liability and the plaintiff’s claim must be dismissed.

*Quantum*

1. For the sake of completeness, I would set out my opinion on quantum.
2. Assuming that the Platform Version suggested by the plaintiff is true and the defendants are liable to the plaintiff, I would hold that there is substantial contributory negligence on the plaintiff’s part. Bearing in mind that the plaintiff is an extremely experienced construction site worker, it would be obvious to him that the Platform is inherently unsafe and it would be dangerous to work on the Platform. He should do what have been suggested in paragraph 21(b) and (c) above and should not work on the Platform. However, he has not done what he should do, and he has done what he should not do. For these reasons, he would be liable for contributory negligence, and I would hold that the quantum of damages should be discounted by 50% by reason of the contributory negligence.
3. In assessing the quantum, I bear the information in the undisputed documents, in particular the opinion in the Joint Report, in mind.
4. PSLA:-
5. I have considered the authorities cited to me on PSLA. I am of the view that the situation in *Tong Lin Keung v Wong Chi Leung* (HCPI 789/1996, 20 October 1999) is similar to the situation in this case.
6. In *Tong Lin Keung*, the claimant sustained injuries as a result of the assault by the respondent. The claimant was given sick leave for about 5 months. The major injuries suffered by the claimant were the neck injury causing disturbance of the balancing system and the head injury with concessional syndrome resulting in memories and mood change. However, the medical evidence did not show that the claimant was suffering from injury which affecting his general activities and enjoyment of life. The court awarded HK$90,000 for PSLA.
7. I would adopt the figure in *Tong Lin Keung* as a starting point. Having taken the inflationary rates set out in *Personal Injury Tables Hong Kong 2016* into account, I would award HK$125,000 for PSLA.
8. Pre-trial loss of earnings:-
9. In the Joint Report, both experts agree that the period of sick leave should be 6 months and that the plaintiff can resume his pre-accident duties on a construction site. I attach full weight to this opinion and accept the same.
10. I would adopt the figures provided by the plaintiff in the EC Declaration Form to assess his pre-accident monthly salary. Based upon the figures therein, the plaintiff’s monthly salary should be HK$19,833.
11. There is no reason why the plaintiff could not resume his pre-accident work after the expiration of the 6-month period of sick leave.
12. There is no evidence showing that the plaintiff had any pre-accident MPF contributions. Accordingly, I would not make an award for loss of MPF.
13. Accordingly, the pre-trial loss of earnings would be HK$19,833 x 6 = HK$118,998.
14. Loss of earning capacity:-
15. Recently, in *Pak Siu Hin Simon v J V Fitness Ltd* (HCPI 574/2014, 15 May 2017), Au-Yeung J reiterated the principle concerning loss of earning capacity and said at [90]:

“In *Yu Kok Wing v Lee Tim Loi* [2001] 2 HKLRD 306, at 311I-312G, Keith JA held that if there is a “**substantial**” or “**real**” risk that a plaintiff would lose his present job at some time before the estimated end of his working life, and he thereby suffers the risk of financial damage, he may be awarded future loss of earnings.” (Emphasis added)

1. I am aware that the Employees’ Compensation (Ordinary Assessment) Board (“the Board”) conducted assessment of the plaintiff’s injuries on 19 November, 20 November and 10 December 2014 and gave the figure of 1.5% as loss of earning capacity permanently. The Board later conducted a review on 11 March, 18 and 19 March 2015 and revised the figure to 3%. However, Dr Woo and Dr Yu jointly examined the plaintiff at a much later time, ie 1 April 2016. As time passes, whether the plaintiff would suffer any permanent loss of earning capacity would become clearer. I would prefer the assessment by the 2 experts to the assessments given by the Board on the question of loss of earning capacity.
2. The opinion expressed by the Joint Report is clear, ie the plaintiff would have no loss of earning capacity. I attach full weight to this opinion.
3. The plaintiff has not produced any satisfactory evidence to prove his claim under this head.
4. I would refuse to give any award to the plaintiff for loss of earning capacity.
5. Special damages:

The plaintiff and the defendants agree that the sum under this head should be HK$14,470. Having reviewed the evidence, I am of the view that this is the appropriate sum.

1. Taking all the aforesaid into account, even if liability is established, the plaintiff would still not be entitled to have any damages in these proceedings.

PSLA: HK$125,000

Pre-trial loss of earnings: HK$118,998

Special damages: HK$14,470

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HK$258,468

Remaining sum after 50% discount

due to contributory negligence: HK$129,234

Less the ECC Award: -HK$552,000

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-HK$422,766

1. For this reason, the plaintiff’s claim would still be dismissed.

*Costs*

1. Save and except the costs of the 2 ex parte applications, both Mr Fan and Mr Sakhrani agree that costs in these proceedings should follow the event, with a certificate for counsel.
2. In respect of the costs of the 2 ex parte applications,
3. Mr Fan submits that the 2 ex parte applications are the internal matters of the defendants, and at the end the defendants decided not to call Lai and Ngai. In these circumstances, the plaintiff should not be asked to bear those costs in any event.
4. Mr Sakhrani submits that the costs of the 2 ex parte applications are part of the costs incurred by the defendants in these proceedings. If the defendants succeed at the end, the defendants should be entitled to get back these costs. That the defendants have not called Lai or Ngai to give evidence is not a factor for not awarding the costs of the 2 ex parte applications to the defendants. Mr Sakhrani says that if a party chooses not to call a particular witness and succeeds at the end of the trial, the party would still be given the costs of preparation of the witness statement of that particular witness.
5. On the question of the costs of the 2 ex parte applications, I agree with Mr Fan. Before making the 2 ex parte applications, the defendants have already experienced difficulties in inviting Lai and Ngai to attend the trial to give evidence. The defendants should decide there and then whether they would need Lai and Ngai to give evidence. If they decide that it would not be necessary to have their evidence at trial, there would be no need to make the 2 ex parte applications. By making the 2 ex parte applications but choosing not to call Lai and Ngai after getting the writs of subpoena, the costs in making the 2 ex parte applications are wasted. In these circumstances, it would not be appropriate to require the plaintiff to bear the costs of the 2 ex parte applications.
6. As to the example given by Mr Sakhrani, ie the successful party would still be given the costs of preparation of the witness statement of a particular witness who has not been called to give evidence at the trial, with respect, in my view the example may not be entirely correct. The question of costs is always decided by the court by exercising the discretion judicially. Whether the court would allow the successful party to get back the costs of preparation of the witness statement of a particular witness who has not been called to give evidence would depend upon the circumstances in that case. I can envisage scenarios in which the court may not allow those costs, for example, the witness statement is extremely lengthy and there is no satisfactory explanation as to why the witness is not called to give evidence.
7. I would make no order as to costs in relation to the 2 ex pare applications. Save and except this, costs of these proceedings should be to the defendants, with a certificate for counsel.

*Conclusion*

1. For the reasons above, I make the following orders:-
2. The plaintiff’s claim be dismissed;
3. In respect of the costs of the 2 ex parte applications, there be no order as to costs;
4. Subject to (b) above, costs of these proceedings (including all costs reserved, if any) be paid by the plaintiff to the defendants, with a certificate for counsel, to be taxed if not agreed; and
5. The plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.
6. Lastly, it remains for me to thank Mr Fan and Mr Sakhrani for the helpful assistance rendered to the court.

( MK Liu )

District Judge

Mr Edward S Y Fan, instructed by Johnnie Yam, Jacky Lee & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Ashok Sakhrani, instructed by Winnie Leung & Co, for the 1st to 3rd defendants