DCPI 1973/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJERIES ACTION NO. 1973 OF 2009**

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BETWEEN

HO FOON CHEUNG Plaintiff

and

SHUN YIP ENGINEERING COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy District Judge Victor Dawes in Court

Date of hearing: 19-20 August 2010

Date of handing down judgment: 8 September 2010

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JUDGMENT

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*I BACKGROUND*

1. Yau Lee Construction Company Limited (“**Yau Lee**”) was the main contractor of the renovation works at the Nurse Quarters of Kowloon Hospital, Block B, No. 147A Argyle Street, Kowloon (“**the Building**”) carried out in 2006. Part of the renovation works were sub-contracted by Yau Lee to the Defendant.
2. The Plaintiff was a painter with some 25 years of experience and was under the employ of the Defendant. On 12 October 2006, whilst he was working on another floor of the Building, he was asked to touch up the walls on the roof.
3. On the said roof were 2 large metal air-conditioning pipes lying parallel closely across the floor (“**the Pipes**”). Each of them had a diameter of 500mm and were supported 250mm above the floor making the top of the pipes 750mm above the floor.

1. The Plaintiff had to walk over the Pipes to get to the other side of the said roof to carry out his work. He was carrying a metal bucket and a paint roller when he lost balance whilst stepping down from the top of the Pipes and fell down. He sustained injury to his left leg.
2. The surface of the Pipes was covered by concrete and there was no suggestion that it had a slippery surface or that there were any water or oil on them at the material time.

1. This is the trial of his action for damages for personal injuries against the Defendant.

*II. DISCUSSION*

1. I am satisfied that the accident took place as summarized in Section I of this Judgment.
2. *Liability*
3. The gist of the Plaintiff’s case is that he did not receive any instructions from the Defendant about access to the place of work nor did the Defendant assess the potential risk involved leaving the Plaintiff to his own device in performing his job. It is alleged that the Defendant did not provide a safe place and system of work for the Plaintiff. Nothing was done to ensure that the said roof would be reasonably safe for the Plaintiff.
4. The Plaintiff referred to the decision of Cheung J. (as he then was) in *Lai Chi Pon v. Toto Steel Iron Works Limited* [1997] 2 HKC 195 on the employer’s duty to provide a safe system of work and exercise effective supervision over the Plaintiff. However, that case was in relation to workers working on a platform at a height of 7 to 8 feet high which is very different from the present case.
5. It is well established that the mere fact of an accident is not evidence of the Defendant’s negligence. As stated by Sakhrani J. in *Wat Kwing Lok v. The Kowloon Motor Bus Company (1933) Limited* [2008] 1 HKC 168 at 172 (paragraph 17):

“The mere fact of the occurrence of the accident is not sufficient to give rise to a presumption of negligence on the part of the defendant. The burden of proof is on the plaintiff to show on a balance of probabilities that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault. If, and only if, the plaintiff proves that the unusual event is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part.”

1. The fact that the Plaintiff slipped and fell is certainly not sufficient to give rise to a presumption of negligence. To the contrary, I consider it one of the ordinary risks that someone in the position of the Plaintiff has to take whilst working on a renovation project. As stated by Ashworth J. in *Sargent v. Gee Stevedoring Company Ltd.* [1957] 1 Lloyd’s LR 357 at 359:

“In my view, the whole claim breaks down when one considers whether it is established that the defendants were at fault. It is said the system exposed the plaintiff to unnecessary risks. I do not think that it did. Stevedores working in barges unloading tubes would be the first to admit that they are not entitled to expect conditions to be altogether level and even. The very nature of the work which they undertake exposes them to the task of working in awkward places.”

1. Further, as stated by Suffiad J. in *Lam Ka Lok Louis v. Swire Properties Management Ltd.* (HCPI 914 of 2003, unreported, 30 April 2005) at paragraph 39:

“The law does not require an employer to treat its workers, in the carrying out of their everyday normal jobs which do not entail any special risk or damage by the workers, as though they were kindergarten pupils who if not told, would not be aware of the kind of common everyday risks that a reasonable person should be aware of.”

1. For the following reasons, I am unable to accept that there was any breach of duty on the Defendant’s part in failing to warn the Plaintiff of the existence of the Pipes and the danger created by their presence:
2. As accepted by Ms. Lee (for the Plaintiff), there was nothing that was inherently dangerous about the roof in question and the Pipes themselves did not create any hazard. It is also not uncommon for there to be pipes and other utilities on roof tops of multi-story buildings.
3. What the Plaintiff was asked to do was straightforward and the assistance of others was not required. This was admitted by the Plaintiff when he was interviewed by the Site Safety Supervisor of Yau Lee after the accident. Prior to the accident, the Plaintiff went to the roof everyday to change his clothes. He was familiar with the environment in question. It is difficult to imagine what instructions or warning his employer could have given to an experienced painter like the Plaintiff in respect of the Pipes.
4. There is no duty on the part of an employer to decide on every detail of the system of work or mode of operation. When the operation is simple, it is reasonable to leave the decision on how the work should be done to the workman to be decided on the spot. See: *Winter v. Cardiff Rural District Council* [1950] 1 All ER 819 at 822-823. I cannot see anything wrong with leaving the Plaintiff to work on the roof on his own on such a simple job.
5. In the statement given by the Plaintiff to the Labour Department after the accident, he suggested that he could have crossed over the Pipes by sitting on them and swinging his legs across. Alternatively, he could have put down his tools so as to obtain better balance when crossing over. As explained by the Plaintiff himself, there were other ways which would allow the him to cross over the Pipes safely but he simply failed to do so.
6. Further, it was clearly stated in the Plaintiff’s witness statement that when he was going over the Pipes, he was pre-occupied by other works which he had to finish on the day. He admitted under cross-examination that his mind was somewhere else. The Plaintiff was an experienced painter and there was no suggestion that he was overloaded with work on the day in question. The Defendant cannot be responsible for the lack of concentration on the Plaintiff’s part.
7. For the above reasons, I find that the Plaintiff has failed to establish any negligence on the part of the Defendant for this accident leading to the injuries suffered by him.
8. *Quantum*
9. Had I found the Defendant liable to the Plaintiff, I would have dealt with the question of quantum as follows.
10. It is common ground that the Plaintiff sustained sub-trochantric fracture of the left femur as a result of the accident. The fracture has healed in satisfactory bony alignment but the Plaintiff complains of on and off buttock aching pain, limited squatting, left low limb weakness and left leg cramping in the evening.

*B1. PSLA*

1. The Plaintiff claims HK$390,000 under head.
2. The Plaintiff relied on the *Yeung Yuk Yiu v. Cheung Tung Ho & Anor.* (HCPI 573 of 2004, unreported, 17 February 2006) and *Cheung Lee Man v. Chan Wai Wing* (HCPI 760 of 2004, unreported, 8 March 2006) and submitted that the award should at least be in the region of HK$300,000. I agree with the Defendant that the 2 decisions are distinguishable and the Plaintiff’s case is less serious.
3. Mr. Sakhrani (for the Defendant) referred me to *Lau Tsz Wan v. Caltex Oil Hong Kong Ltd. & Anor.* [2005] HKLRD (Yrbk) 357 where the Plaintiff therein suffered a fracture of the neck of the right femur and underwent closed reduction and hip screw fixation operations. The Court awarded HK$250,000 to the plaintiff therein.
4. In this matter, I am satisfied that the Plaintiff has exaggerated his injury. In the report of Dr. Leung Hip-wing, it was noted that the Plaintiff “was last seen in our out-patient clinic on 13th February 2008. He was able to walk with the assistance of a stick.” This is in sharp contrast with the situation captured by surveillance video in January 2008 when the Plaintiff was seen standing and walking normally without any assistance for an extended period of time.
5. Given the aforesaid finding, in my judgment, an award of HK$200,000 under PSLA would have been appropriate.

*B2. Pre-trial Loss of Earnings*

1. Prior to the accident, the Plaintiff was earning HK$700 per day. He was granted sick leave for 574 days (from 12 October 2006 to 13 February 2008 and from 20 May 2008 to 11 August 2008) and found alternative employment as a security guard since 16 October 2008. A sum of HK$401,800 (i.e. HK$700 x 574) is claimed.
2. The Defendant argued that sick leave should only be allowed to 14 November 2007 because it is clear from the January 2008 surveillance that his condition was not what the doctor was led to believe. It was also pointed out that after the sick leave granted by government hospitals expired in February 2008, the Plaintiff went to a private orthopaedics specialist and obtained sick leave certificates for the period from May to August 2008. Although the Plaintiff subsequently attempted to change his answer, he did admit that the reason for seeing the private orthopaedics specialist was to obtain sick leave certificates. The clear implication was that he was unable to obtain further sick leave certificates from the doctors at Queen Elizabeth Hospital who were treating him previously.
3. In light of my finding on exaggeration of injury and the way in which the sick leave certificates for the period from 20 May 2008 to 11 August 2008 were obtained, I would have been prepared to allow 493 days and a total sum of HK$345,100.

*B3. Loss of Earning Capacity*

1. The Plaintiff relies on the fact that according to the joint medical report prepared by Dr. Johnson C. K. Lam and Dr. Lam Kwong Chin, although he should be able to return to his pre-injury work, some reduction in work efficiency and endurance due to residual symptoms are expected. The Plaintiff claims HK$150,000 for loss of earning capacity.
2. The Defendant contended that the Plaintiff had failed to show any risk of prejudice in the labour market and offered HK$10,000 to err on the side of caution.
3. The joint medical report concluded that the Plaintiff should have no difficulty with his present job as a security guard. I also find that he made no real attempt to look for a job as a painter after the accident. His suggestion that nobody was willing to hire him because his injury was well known in the market is difficult to believe and I reject the same. However, in light of the opinion as contained in the joint medical report, I am prepared to allow HK$30,000 under this head.

*B4. Special damages*

1. This is now agreed at HK$8,868 and I would have so ordered had I found the Defendant liable.

*B5. Summary*

1. For the above reasons, the total damages I would have awarded to the Plaintiff are as follows:

PSLA HK$200,000

Pre-trial loss of earnings HK$345,100

Loss of Earning Capacity HK$30,000

Special damages HK$8,868

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HK$583,968

1. Employees’ compensation in the total sum of HK$325,981.33 has been received. Had liability been established, it would have to be deducted from the global sum.
2. If liability had been established, special damages would have carried interest at half judgment rate from the date of the accident to the date of the judgment (and thereafter at judgment rate). The award for PSLA would have carried interest at the rate of 2% per annum from the date of the writ to the date of judgment (and thereafter at judgment rate).
3. *Conclusion*
4. For the above reasons, the action is dismissed. I make a costs order *nisi* that the Plaintiff pay to the Defendant its costs of the action, with certificate for counsel, to be taxed if not agreed. I further order that there be legal aid taxation of the Plaintiff’s own costs.

(Victor Dawes)

Deputy District Judge

Ms. Rebecca M. K. Lee instructed by Yeong & Co. for the Plaintiff

Mr. Ashok Sakhrani instructed by Messrs. W. K. To & Co. for the Defendant