LA/ECC/15018/2005 (DK28)

DCPI 2136/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSON INJURIES ACTION NO. 2136 OF 2006

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BETWEEN

##### TSANG CHING FEI Plaintiff

##### and

##### MO KING GUO Defendant

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Coram : Her Honour Judge H.C. Wong in Court

Dates of Hearing : 17 – 19 March 2008

Date of Handing Down Judgment : 2 April 2008

JUDGMENT

1. The Plaintiff (“Mr. Tsang”) claims against the Defendant for common law damages for injuries suffered at a construction site accident as an employee of the Defendant on 27 March 2004.
2. The Defendant denies he was the employer of the Plaintiff on the day of the accident or at all.

Liability

The Plaintiff’s Case

1. The Plaintiff claimed he was employed by the Defendant, Mr. Mo, to work as a casual labourer at various construction sites since September 2003. On 27 March 2004, he was working at a site located at 26, A Shan Tseng Tau Tsuen, Tai Po, New Territories (“the site”) when the brick wall he standing next to suddenly collapsed injuring his left big toe.
2. He was immediately taken to the Alice Ho Mui Ling Nethersole Hospital in Tai Po (“the Nethersole Hospital) by Mr. Mo and his staff Mr. Law Kwok Leung in Mr. Mo’s car. He was transferred to the North District Hospital on the same day where he remained for 11 days. He received an operation for open reduction, screw fixation and k-wire fixation on his left big toe.
3. He was followed up at the North District Hospital until 28 September 2004 after which he defaulted both further follow up and occupational therapy treatments. He sought medical treatments in China on 14 July 2004 and had the screw fixation removed on 16 July 2004 at the Ping Le Hospital in Shenzhen, he was discharged after 12 days on 27 July 2004. He claimed it was Mr. Mo who had introduced and drove him to the Shenzhen hospital and paid the medical and hospital expenses for him.
4. He returned to Ping Le Hospital for follow up treatment on 19 August 2004 by himself after Mr. Mo had accompanied him to the Fushan City Chinese Hospital (佛山市中醫院) for treatment on 9 August 2004.
5. Furthermore, Mr. Tsang alleged that Mr. Mo had personally delivered to his home on 10 occasions compensation payments between 10/4/04 and 28/9/04 in the total sum of $30,500.

The Defence Case

1. The Defence adduced evidence from Mr. Mo, Mr. Diu Sum Fat and Mr. Law Kwok Leung. It is the evidence of the Defence witnesses that Mr. Mo was under contract with Mr. Diu’s company “Shui Fat Estate Company Limited” to erect a village type house at Lot 183 of D.D.14 of A Shan Tseng Tau Village in Tai Po. The Defence produced documents including a certificate of exemption of the site formation works with a schedule of conditions attached dated 12 August 1999, an application for certificate of compliance of 3 June 2003 and the certificate of compliance issued on 4 November 2003 (pp.105-181-1 of the bundle).
2. It is the evidence of Mr. Mo that the work at the site had completed in June 2003 after which date it had no further construction work to perform at the site. Consequently, he claimed he could not be the employer of Mr. Tsang on the day of the accident at the site.
3. Mr. Mo admitted in court that Mr. Law had introduced Mr. Tsang to him as a clansman. He gave Mr. Tsang a lift to Shenzhen in July 2004 because he happened to be going to China to purchase building materials with his relative Mr. Wan in Mr. Wan’s car. He denied he had either suggested Mr. Tsang to seek treatment at Ping Le Hospital or accompanied him there on that day. He also denied he had accompanied Mr. Tsang to the Fushan Chinese Hospital for treatment on 9 August 2004. He admitted he came across Mr. Tsang by chance on the train.
4. Mr. Mo further denied he had given a total of $30,500 to Mr. Tsang after the accident, or that he had paid the Shenzen or Fushan hospital expenses for him.

The Issues

1. The issues to be determined are:
   * 1. whether Mr. Tsang was an employee of Mr. Mo at the site on 27 March 2004;
     2. if the answer to (a) is yes, whether the Defendant, Mr. Mo, was negligent in failing to provide a safe system or method of work, suitable tools, equipments and appliances and adequate instructions and training to Mr. Tsang;
     3. whether Mr. Tsang was in breach of common duty of care, contract of employment, statutory duty under the provisions of the Factory and Industrial Undertakings Ordinance Cap. 59 and Occupational Safety and Health Ordinance and Regulations Cap. 509 and the Occupiers Liability Ordinance Cap. 304.

Applicable Legal Principles

1. The applicable legal principles in this type of cases has been set out succinctly by Megaw L.J. in the English case of Ward v. Tesco Stores Ltd. [1976] 1 WLR 810 at 815:

“It is for the plaintiff to show that there has occurred an event which is unusual and which, in absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault.”

1. The above dictum has been adopted by the Hong Kong Courts in personal injuries cases. It is beyond dispute that the burden of proof is on the plaintiff to show on a balance of probabilities that an unusual event had occurred, and, in the absence of explanation is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden then shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part. (see para. 16 of the judgment of Sakhrani J. in Wat Kwing Lok v. KMB HCPI 936/2006, date of judgment 20 November 2007).
2. Section 6 of the Occupational Safety and Health Ordinance Cap. 509 provides:

“**6. Employers to ensure safety and**

**heath of employees**

1. Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer’s employees.
2. The case in which an employer fails to comply with subsection (1) include (but are not limited to) the following –

(a) a failure to provide or maintain plant and systems of work that are, so far as reasonably practicable, safe and without risks to health;

……..

(c) a failure to provide such information, instruction, training and supervision as may be necessary to ensure, so far as reasonably practicable, the safety and health at work of the employer’s employees;

……..

(e) a failure to provide or maintain a working environment for the employer’s employees that is, so far as reasonably practicable, safe and without risks to health.

1. An employer who fails to comply with subsection (1) commits an offence and is liable on conviction to a fine of $200,000.
2. An employer who fails to comply with subsection (1) intentionally, knowingly or recklessly commits an offence and is liable on conviction to a fine of $200,000 and to imprisonment for 6 months.”
3. Construction Sites (Safety) Regulations Reg. 49 provides:

“**49. Protection from falling materials**

* 1. Where workmen are employed at any place on a construction site, the contractor responsible for the site shall take such precautions as necessary to prevent any workman working at that place from being struck by any falling material or object.”

Findings

a. whether Mr. Tsang was an employee of Mr. Mo at the site on 27 March 2004

1. Mr. Tsang’s evidence at the trial was consistent with his witness statement of 21 April 207. He claimed he was introduced to Mr. Law Kwok Leung by a clansman who came to Hong Kong on a “2 way permit” i.e. visitor’s visa from China. Mr. Law took him to see Mr. Mo at Mr. Mo’s tool shed in Elle Villas, Shan Yiu Road, Tai Po (“the tool shed”) in September 2003. He was hired as a casual construction site labourer at a daily wage of $250. Thereafter, he was taken to and worked at various construction sites under the supervision and instruction of Mr. Law at Lok Ma Chau, Tai Mei Tuk and Tai Po. On the day of the accident, he had been working at the site for about one month.
2. The Defence, however, disagreed that Mr. Tsang had been employed by Mr. Mo at any time. Mr. Mo admitted Mr. Law brought Mr. Tsang to see him at the tool shed sometime in 2003. The second time he met him was July 2004 when he gave him a lift to Shenzhen and the last time he saw him was the chance encounter with Mr. Tsang on the train in Louwu in August 2004.
3. Mr. Law’s evidence of the first meeting between Mr. Mo and Mr. Tsang was somewhat different. He admitted to have brought Mr. Tsang to meet Mr. Mo after he came to know Mr. Tsang at his home town in China in 2003. He had no idea what Mr. Mo and Mr. Tsang talked about when they met at the tool shed. He claimed Mr. Mo did not hire Mr. Tsang to work for him and he had never seen Mr. Tsang working at Mr. Mo’s construction sites. On that occasion, he claimed he had lent Mr. Tsang some money.
4. Mr. Law claimed Mr. Tsang had not worked with him at any of Mr. Mo’s construction sites. He further claimed there was no construction work at the site on 27 March 2004.
5. According to Mr. Tsang’s evidence, when he was assigned to work at the site in March 2004, the house was already completed and the work at the site he took part in was the garden, the boundary wall and the slope. He claimed he was working together with Mr. Law at the time of the accident to flatten the concrete over the garden area and on top of the brick wall that marked the site boundary (see p.16 – 17 of the bundle).
6. Mr. Tsang’s description of the work and the site area is consistent with the description of the site given by Mr. Law. He agreed in March 2004, the site boundary wall was a brick wall of 1.5 metre high. The height of the retaining wall and slope was in line with the conditions laid down in the certificate of exemption issued by the District Land Office on 12 August 1999 (p.105 of the bundle). The conditions specified the height of the retaining walls or terrace walls not to exceed 1.5 metre.
7. According to Mr. Diu, the site property was sold in February 2004 after the village house premium was fully paid up by him on behalf of Mr. Li Chi On, the indigenous owner of the right to build on the land in the village. It is therefore clear that the register owner of the site in March 2004 is no longer Mr. Li Chi On or the developer, Shui Fat. It is not a mere co-incidence that the letters addressed to Mr. Li between March and November 2003 from the Tai Po District Land Office were sent to the registered address of Hung Lung Holdings Construction Limited (“Hung Lung”) of which Mr. Mo is a shareholder. Mr. Mo also happened to share the same address as Hung Lung. If Shui Fat or Mr. Dui was the developer who acted on behalf of Mr. Li, there was no explanation as to why Mr. Mo’s address was used for communication with the Tai Po District Land Office in 2003. Neither was it explained why Mr. Law who was a trusted staff of Mr. Mo at the time should still be working at the site on 1st March 2004 if the contract work with Shui Fat had completed in June 2003. The inference is Hung Lung or Mr. Mo was authorized to handle the affairs related to the site with the District Land Office.
8. Mr. Law admitted he was under an employment contract with Mr. Mo (P.135 of bundle) and was working for Mr. Mo in March 2004 up to 2005. As the certificate of compliance had been issued in November 2003 and the property sold in February 2004, it is obvious Mr. Law working under Mr. Mo was performing the work at the site for the new owner of the site. The work involved, according to Mr. Tsang, raising the level of the garden with concrete and the retaining wall to above 1.5 metre high, beyond the height permitted under the conditions set out in the certificate of exemption. Both Mr. Tsang and Mr. Law were positive when they were asked about the height of the wall and both referred to the retaining wall as above 1.5 metre high.
9. Mr. Tsang, in spite of his lack of formal education, was able to give clear details on the size of the wall on 27 March 2004. He was further able to give details of the surrounding area of the tool shed he visited. He claimed he visited it daily during the one month he was working at the site waiting for Mr. Law to drive him over to the site every morning in Mr. Mo’s car. His knowledge of the tool shed is contrary to the claim of Mr. Law and Mr. Mo that Mr. Tsang had only visited the shed once. Further, Mr. Tsang kept a clear record of the dates and amount of each of the 10 payments Mr. Mo gave him after the accident. On the same sheet of paper he wrote down Mr. Mo’s office telephone and two mobile phone numbers and his office address under the name of Hung Lung Holdings.
10. It is unfortunate that no admission record at the Accident and Emergency Department of Nethersole Hospital on 27 March 2007 had been produced. The hospital records would have shed some light as to what Mr. Tsang told the nurses and doctors about the accident and whether the accident was classified by the attending doctor as an industrial accident on the admission record. Mr. Tsang admitted he had failed to report the accident to the Labour Department until November 2004 because Mr. Mo told him he would file the accident report, but Mr. Mo had failed to do so. He claimed he did not know how to report the accident to the police at the time of admission to Nethersole Hospital. I find this difficult to comprehend for someone who had been working at construction site since his arrival to Hong Kong in 1998. For the same reason, that he should have failed to take a construction site safety training course until August 2003, one month before he commenced working for Mr. Mo. He claimed he did not know he needed to obtain a training course certificate (“green card”) to work at a construction site after May 2001 under the law. On the other hand, I do not find it has much bearings on the accident because by March 2004 he had obtained a green card to work at the construction site.
11. After considering the details of the evidence of Mr. Tsang and those of Mr. Mo and Mr. Lau, I find Mr. Tsang’s evidence to be truthful and credible. On a balance of probabilities, Mr. Tsang had successfully shown he was employed by Mr. Mo on the date of the accident to work on the retaining wall of the site.

b. – whether the Defendant was negligent by failing to provide a safe system of work, safety equipments and footwear and instructions to Mr. Tsang

1. Mr. Tsang was working with Mr. Law and under his supervision at the time the accident happened. He has shown Mr. Mo had failed to supply such tools and footwear or provide a safe system of work to ensure Mr. Tsang was safe from harm. Mr. Tsang was given only a shovel and a pair of Wellington boots to do the concreting work at the site. If he was given a pair of construction site safety boots, the injury to Mr. Tsang’s left big toe would not have been as serious.
2. I accept Mr. Tsang was working under Mr. Law’s supervision and direction on Mr. Mo’s project at the site and Mr. Mo was the employer and occupier at the site. The work to raise the height of the retaining wall was in breach of the conditions under the certificate of exemption. This may be one of the reasons Mr. Mo denied he was the contractor responsible for the work. The fact that he should give a lift to Mr. Tsang to Shenzhen in Mr. Wan’s car in July 2004, someone he admitted to have met only once before, is incredible and defies common sense. I find he did take him to Shenzhen for medical treatments and paid the expenses because he felt responsible as the employer. Furthermore, I do not think Mr. Tsang would fabricate receiving $30,500 from Mr. Mo. I hold Mr. Mo did pay a total of $30,500 to Mr. Tsang between April and September 2004 because Mr. Tsang was employed by him when the accident took place. I am also satisfied that Mr. Tsang was hired to work on a monthly basis rather a casual labourer on a project basis. On that basis, he was paid a lower daily wage of $250 than the daily wage of $350, which Mr. Mo admitted was the going rate for a casual labourer. Again, I do not believe Mr. Tsang would fabricate the fact that he was getting a lower than average daily wage.
3. For the aforesaid reasons, I find Mr. Mo to be liable to Mr. Tsang for negligence and for failing to provide a safe system of work, safety equipment and footwear in breach of the Occupational Safety and Health Ordinance and the Construction Sites (Safety) Regulations. He failed to discharge the burden of proof to show he was not at fault. Neither had the Defence successfully shown Mr. Mo had contributed to the negligence.

Quantum

Medical evidence

1. The joint medical report of Dr. Chan Ping Keung and Dr. Lam Kwong Chin confirmed Mr. Tsang had suffered fractures to the distal and proximal phalanges of his left big toe. He received an operation to fix the fracture at the North District Hospital. The X-ray showed the fracture had healed but his inter-phalangeal joint remained stiff. He was referred to occupational therapy in September 2004 but he defaulted both further follow up treatments and occupational therapy. At the Medical Assessment Board review of assessment on 11 November 2006, he was assessed to have suffered left big toe injury resulting in stiffness, numbness, scar and pain with loss of earning capacity permanently caused by the injury assessed at 2%. The MAB allowed the period of sick leave from 27 March to 20 April 2004 and 18 May 2004 to 8 August 2004.
2. Mr. Tsang told the two doctors that he had off and on daily pin-prick pain over his left big toe, the pain was provoked by prolonged walking of over one hour. He suffered from stiffness of big toe and numbness to the left knee down to his toe every night. The two doctors confirmed Mr. Tsang’s IPJ (interphalangeal joint) had limited movement due to pain though the fracture had healed. Dr. Chan recommended Mr. Tsang to consider a fusion operation of the IPJ if there should be persistent pain over the big toe despite conservative treatment. Dr. Lam, however, considered Mr. Tsang should take up exercise for joint mobilization. He believed if Mr. Tsang had taken up the occupational therapy when it was offered in October 2004, the stiffness and contracture would have improved.
3. Both doctors agreed with the MAB assessment of 4 months sick leave. Dr. Chan assessed the loss of earning capacity to be 4% while Dr. Lam assessed it at 2%.

Pain, Suffering, Loss of Amenities

1. Mr. Wong, legal representative of Mr. Tsang, submitted that the appropriate award under this head should be $200,000. He referred to the award made by Master de Souza in the case of To Ying Wa v. Cargo-land (warehouse) Development Ltd. (HCPI 441/2000) where the 18 year old plaintiff suffered fractures to the 4th and 5th metacarpals of the right foot. He also relied on the case of Siu Fu Yan v. Cheung Kwok Leung & ors. (DCPI 1081/2005) one of my assessments on 20 April 2007 where the 50 year old plaintiff suffered a fracture to the base of the proximal phalanx of the left toe. The MAB assessed a loss of earning capacity at 2%.
2. Mr. Ho, Counsel for the Defence, relied on the award made in Cheung Chi Wah v. Wai Luen Metal Factory (HCPI 66/1995) by Deputy Judge W. Wong in 17 December 1997 awarding $50,000 to the plaintiff who suffered a fracture to the middle phalanx of his second toe. Mr. Mo suggested an award between $50,000 and $80,000 to be appropriate because he believed Mr. Tsang had exaggerated his pain and suffering.
3. According to the joint medical report, Mr. Tsang told the doctors he had in fact returned to work for a few days after the accident. He also admitted to the doctors he had worked for a few days in 2006, but had not done so in 2007. Both doctors agreed he is able to return to his previous job. On this basis, I believe Mr. Tsang should be able to return to full time work. Had he taken up the occupational therapy offered him in October 2004, he would have recovered much of the movements in his left big toe and suffered less stiffness and pain when he moved his left big toe. For the pain and suffering and loss of amenities suffered by him, the appropriate award is $180,000.

Pre-trial loss of Earnings

1. Both Drs. Chan and Lam considered the reasonable sick leave period to be 4 months which is the same as the period allowed by the MAB. I accept the reasonable pre-trial loss of earnings to be 4 months at $6,000 per month.

$6,000 x 4 = $24,000

MPF $24,000 x 5% = $1,200

1. Mr. Wong claimed that Mr. Tsang had further suffered a loss of $2,500 p.m. due to permanent disability after the sick leave period. Mr. Ho on the other hand submitted Mr. Tsang did not suffer any loss of earnings after the sick leave period.
2. The MAB had allowed 4 months of sick leave and assessed the loss of earning capacity to be 2%. Based on the joint medical opinions, Mr. Tsang should be able to return to his previous job after the 4 months sick leave, but based on Mr. Tsang’s evidence and the medical receipts from Shenzhen, it is obvious he required and did receive further medical treatments in July, August and September 2004. I will allow 3 further months of loss of income during the recuperation period in the sum of $6,000 x 3 = $18,000. There is no supporting evidence from the Plaintiff in support of his claim that he suffered from a reduced earning capacity of $2,500 per month.
3. There should be no further loss of earnings other than the 2% or 4% loss of earning capacity according to the two medical experts. Mr. Tsang claimed he had not been able to find employment to date due to the pain on his toe, I find this claim to be an exaggeration. He told the two doctors that he only felt pain after walking for over one hour. Not only would his condition be improved if he kept up with occupational therapy and exercise, he should also try to adjust his work with his condition, after all he is only 30 years old. There is no evidence he had looked for employment in other fields or adjusted the work to his physical condition. He admitted he had returned to live in China since 2006 where the wages are much lower than Hong Kong. It is probably due to his absence that he failed to obtain employment in Hong Kong. His evidence on this aspect is unsatisfactory, I do not think he is entitled to any loss of pre-trial earnings other than a general loss of earnings set out below.

Future Loss of earnings

1. I am prepared to make an award based on the loss of earning capacity of 2%. It means that it would take Mr. Tsang longer to finish a task at the construction site because he would be required to take more rests during the day. Consequently, the monthly wage may suffer a 10% reduction in his future earnings, i.e. $600 per month.
2. Mr. Wong suggested a multiplier of 15 following the case of Limbu Netra Kumar v. Yau Lee Construction Co. Ltd. & anor. HCPI 234/2002 and Shak Nisar v. Wai Kit Engineering Co. Ltd. & ors (HCPI 1092/2002), and on the basis that Mr. Tsang was 26 at the time of the accident and 30 at the date of trial. I accept 15 to be a suitable multiplier, the award is therefore:

$600 x 12 x 15 = $108,000

Special Damages

1. The parties agreed the following expenses:

North District Hospital fees $1,000

North District outpatient treatments 300

Travelling: Plaintiff 300

Relatives 660

PRC medical expenses and travelling 550

$2,810

Summary

1. PSLA $180,000

Pre trial loss of earnings : sick leave

March to June 2004 25,200

July to September 2004 18,000

Future loss of earnings 108,000

Special damages 2,810

$334,010

less $30,500 compensation paid $303,510

Interests

1. Interests agreed by the parties is ½ judgment rate for special damages from the date of accident and 2% on general damages from the date of writ to date of judgment. I so order.
2. Costs - Costs nisi to the Plaintiff to be taxed if not agreed, The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

( H.C. Wong )

District Court Judge

Parties :

Mr. Wong Chi Leung of Messrs. Hobson & Ma for the Plaintiff.

Mr. Tommy K.K. Ho instructed by Messrs. Kenneth Woo & Co. for the Defendant.