#### DCPI 2301/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2301 OF 2009

BETWEEN

CHUNG PAK CHEONG RIGO Plaintiff

and

CHEUNG WAI CHUNG (張偉中) 1st Defendant

TRANSPORT INFRASTRUCTURE

MANAGEMENT LIMITED (previously known as

TSING MA MANAGEMENT LIMITED 2nd Defendant

##### Before: His Hon Judge Leung in Court

Date of Hearing: 31 January; 1 February; 3 February 2012

Date of Judgment: 13 April 2012

## J U D G M E N T

1. The plaintiff (“**Chung**”) and the 1st defendant (“**Cheung**”) were colleagues under the employ of the 2nd defendant (“**the Company**”) on 24 January 2007 when Cheung suddenly assaulted Chung in the course of work. This is Chung’s claim for damages for his injuries as a result of the assault.
2. Two things happened when the trial began. First all the parties managed to agree on the quantum as follows:

Pain suffering and loss of amenities HK$200,000.00

Pre-trial loss of earnings with MPF HK$ 99,415.06

Special damages HK$ 9,770.00

Less: amounted already reimbursed HK$ 7,715.00(-)

Future medical expenses HK$ 1,600.00

HK$303,070.06

Less: employees’ compensation received HK$127,368.75(-)

Net total: HK$175,701.31

1. Second, Cheung, who acts in person in the present action, admitted liability. Upon that, judgment was entered against Cheung forthwith for damages in accordance with the above agreed quantum with interest. I also awarded costs of this action against Cheung in favour of Chung.
2. The trial then proceeded as one of the liability of the Company.

***BACKGROUND***

1. The Company was at the material time and still is in charge of the management and maintenance of various bridges in Hong Kong, including the Tsing Ma and Ting Kau Bridges. Chung and Cheung were at the time skilled workers attached to the Company’s team responsible for the maintenance of the metal parts of the bridges.
2. After finishing work at the Ting Kau Bridge in the afternoon of 24 January 2007, Chung, together with Cheung and other colleagues, was inside the Company’s vehicle on their way back to the administration building on Lantau Island. Suddenly, Cheung struck the head of Chung with a spanner. The vehicle stopped. Outside the vehicle, Cheung carried out further assault on Chung until they were separated by the other colleagues. Police and ambulance were summonsed.
3. As a result of the incident, Cheung was subsequently arrested and charged with wounding. On 22 February 2007, Cheung was convicted as charged in the Tsuen Wan Magistracy and sentenced to 6 months’ imprisonment (Case No. TWCC 537/2007).
4. The above background is common ground. Chung claims damages for his injuries against Cheung. He also claims the Company should be liable for failing to prevent the assault.

***THE DISPUTE***

1. By pleading, the claim against the Company rests on the basis of negligence or breach of statutory duty under the Occupational Safety and Health Ordinance. When the trial began, Mr Cheung for Chung abandoned the latter cause of action. The sole cause of action against the Company therefore is the tort of negligence.
2. Mr Cheung for Chung also confirmed that there is no allegation of vicarious liability on the part of the Company for the conduct of Cheung at the material time. The claim in negligence is therefore based on the alleged breach of duty owed by the Company directly towards Chung. Of such duty, it was further confirmed that there is no issue of whether Cheung, when employed, was a competent co-worker in the first place.
3. The essence of Chung’s case may be found in the following pleading (at §1(c)):

“Prior to the accident, the First Defendant had **a record of hitting other fellow employees** of the Second Defendant. The **past accident(s) of hitting the colleagues** by the First Defendant was reported to the management of the Second Defendant, namely, Mr Chan Wai Yip, an Engineer. The management of the Second Defendant was aware of the **incident(s) of the injuries caused by the First Defendant to his colleagues in a way similar to this accident**. Nevertheless, the Second Defendant took no action to prevent the injuries caused by the First Defendant to his colleagues again.”

[*emphasis added*]

1. Among the various particulars of negligence on the part of the Company, the really essential ones (at §2) are pleaded as follows:

“(i) Exposing the Plaintiff to a **risk of injury**, which the 2nd Defendant and/or his employees and/or servants and/or agents **knew or ought to know**.

(ii) Failing to take any responsible step and measure to protect the Plaintiff who was in the course of carrying out his employment duties from **violent attacks of the 1st Defendant**, having regard to the fact that the 2nd Defendant had **actual knowledge of 1st Defendant’s previous attack on other fellow employee** of the 2nd Defendant.”

[*emphasis added*]

1. In this respect, it is worth noting that in his homemade defence, Cheung denies he had any fighting incident with other colleagues.
2. In defence, the Company refers to a single previous incident in 2006 involving a personal dispute between Cheung and his colleague. However no hitting or violent attack was involved. Nor was personal injury resulted. That matter was also amicably settled between the 2 colleagues concerned.
3. The Company contends that the present incident was unforeseeable and it was impossible for the Company to know or ought to have known that there would be a real risk of Chung being physically attacked by Cheung. In the circumstances, the Company denies the alleged breach of its duty to Chung.

***DISCUSSION***

***The principle***

1. The starting point is summarised by Keith JA in *Wong Wai Ming v The Hospital Authority* [2001] 3 HKLRD 209 (at §8) (which was a case involving an employee suffering attack by another in the course of work):

“An employer is under a duty to its workforce to take reasonable care for their safety. Where one employment happens to be more dangerous that 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: see Charlesworth & Percy on Negligence, 9th ed., para.10-83. 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…… The 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……**It 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**.”

[*emphasis added*]

1. In the context of a case like the present one, the above general principles could be translated to become that if an employer knows or reasonably foresees that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, he may be in breach of his duty to that employee: see *W v Commissioner of Police for the Metropolis* [2001] PIQR 81 (at §108).
2. Counsel have referred to decided cases involving employees being victims of attack in the course of work: *Tam Sau Fong v Sheng Kung Hui Diocesan Welfare Council* [2002] 3 HKLRD 431; *Li Hoi Shuen v Man Ming Engineering Trading Co Ltd* [2006] 1 HKLRD 84; *Cheng Loon Yin v Secretary for Justice & Anor* [2006] 1 HKLRD 871; *Ling Man Kuen v Chow Chan Ming & Anor*, DCPI 1445/2005 (21 August 2006); *Chan Ah Kwong v Yan Cheuk Lun & Ors*, HCPI 287/2005 (10 August 2009); *林土陽v寬泰貿易有限公司經營心粥館*, HCPI 251/2005 (13 May 2009); and *Wu Leung Kui Jacky v Leung Ming Yun & Ors*, DCPI 1154/2008 (7 March 2011). In my view, these are examples of the application of the above principles; and it is always the facts of the case that count.
3. Unlike the circumstances of some of the previous decided cases, the employment in the present case by nature did not involve the potential danger of the employees being physically abused, let alone attacked, by colleagues or other third parties in the ordinary course of work.
4. In order to establish liability of the Company, Chung needs to prove as a matter of fact that Cheung had the propensity to attack his colleagues, if not Chung in particular, and that the Company knew or ought to have known such being a real risk so that steps should have been taken to eliminate the same. His counsel, Mr Cheung, accepted that.

***The facts***

1. Beside Chung, the other witnesses who testified included his colleagues Cheung Po Loon (“**Loon**”), Cheung Hin Fai (“**Fai**”), Chan Wai Yip Benny (“**Chan**”), the engineer, and Yiu Wai Keung (“**Yiu**”), the supervisor.
2. The testimony in common revealed that the employees had worked as a team for about 6 years prior to the present incident in 2007. Cheung is a quiet person. The working relationship among the colleagues, including that between Chung and Cheung, was harmonious. Chung and Cheung shared the common hobby of going fishing; and had gone fishing together. None of them have ever learned about any argument or dispute between Chung and Cheung before.
3. The witnesses gave evidence in respect of what they knew about the incident in 2006. It happened in about June 2006 involving Cheung and Loon near the entrance of the administration building. According to Chung, Cheung suddenly attacked Loon from behind and used his hands to hold Loon’s hair hard. In court, Chung added that Cheung also kicked Loon with his knees. Yiu tried to separate the two; and he tried to restrain Cheung.
4. Loon’s description of the incident was somehow different. According to him, Cheung walked to his front and used his hands to hold the hair on both sides of Loon’s head. It was not violent pulling; and he felt slight pain. Cheung questioned if Loon had talked about him behind his back. Loon denied the accusation. Loon felt more surprised than scared. At that point, and upon Yiu’s demand, Cheung immediately let go of Loon’s hair. The two were separated. Loon confirmed there was no fighting or struggle with Cheung. He also did not recall any kicking by Cheung as alleged by Chung. The body contact between Cheung and Loon was a brief one.
5. Chung claimed that ever since the incident in 2006, he had been on guard for the fear that Cheung might lose control of his temper and attack people again. In his evidence, Chung described Cheung as a “time bomb”. However, Mr Wong for the Company questioned whether Chung indeed had the alleged fear and concern about Cheung. More importantly, he questioned whether the alleged concern is objectively substantiated so that the Company as the employer should have paid heed to. For the following reasons, I have the same questions.
6. What happened was that after the incident, Yiu, the engineer, immediately reported to his superior Chan. Chan then gathered Cheung and Loon as well as other colleagues together to inquire into what happened. Chan ascertained from Loon if he would pursue the matter further. According to Chan and Loon, Cheung represented to those present that he had no real intention to hurt Loon. Cheung admitted his wrongdoing; and regretted his momentary anger. Cheung also apologised to Loon.
7. As he also explained in court, Loon accepted that Cheung acted the way he did out of his misunderstanding about Loon. Loon was convinced that Cheung was remorseful and his apology was genuine. He forgave Cheung and they shook hands. Further, as a gesture of his sincerity, Cheung subsequently treated Loon and the other colleagues to meal. The atmosphere during the meal was good. In court, Chung agreed that that was in fact how the incident in 2006 was settled.
8. According to Loon, his relationship with Cheung since the incident in 2006 has remained friendly. Chung confirmed that since the incident in 2006, he has been assigned to work with Cheung for several times. Though he felt Cheung became relatively quieter than before, Cheung remained serious and conscientious at work as before. On no occasion did he find it necessary to communicate to his superior, Yiu, any concern or fear on his part about Cheung.
9. No workers claimed to have ever foreseen Cheung’s attack on Chung on the day in question. During the assault, Cheung seemed to accuse Chung of having said bad things about him. However Fai gave evidence that he knew of no argument between Chung and Cheung. The fact was that the team had worked for the whole morning that day uneventfully; and it was during their journey in the vehicle back to the administration building in the afternoon that the assault took place.
10. Judging from his subsequent statement to the police, one could tell that Chung’s attention was drawn to what he reckoned might have caused the attack. Notwithstanding his alleged fear about Cheung’s propensity to lose temper or control ever since the incident in 2006, which, if true, had apparently materialised, no mention was made to the police about that.
11. Perhaps the lack of mention to the police could be explained. However, the statement of claim filed in November 2009 still made no mention of the incident in 2006, notwithstanding that the claim against the Company is based on whether the Company appreciated the impact of that incident. The statement of claim was amended in October 2010. I highlighted above the parts of the amendments that warrant emphasis. The allegation of a record of previous attack(s) by Cheung causing injury to fellow employee(s) in a way similar to the present attack on Chung is simply proven incorrect as a matter of fact.
12. In his submission, Mr Cheung for Chung suggested that Cheung was prone to attacking other fellow employees with violence. He submitted that such inference can be drawn from the short time interval between the incident in 2006 and the attack on his client.
13. In my view, the basis for the inference is flawed. The issue of the risk of Cheung attacking his colleague during work should be judged in view of the history prior to the occurrence of the attack in the afternoon of 24 January 2007.
14. Mr Cheung for Chung referred to the evidence of his client and Yiu that the Company had previously dismissed 2 employees for fighting during work. Mr Cheung submitted that the same measure against Cheung would have eliminated the risk of attack by Cheung that the employees were exposed to.
15. But the fact was that the nature and gravity of the incident in 2006, according to Loon and I accept, was not as serious as that described by Chung. Nor does it appear to be as serious as the previous fighting incident between the other 2 employees, the exact circumstances of which are actually unknown.
16. According to Chan, the Company’s policy governing employee misconduct provided for verbal warning, written warning, reprimand and termination of employment, depending on how serious the case was. When asked in court, Chan maintained his assessment of Cheung as a conscientious and candid employee by reference to his performance in the years prior to the incident in 2006 (and even thereafter). Termination of employment, in his view, would have been too serious a step to take in the circumstances. As mentioned, Chan did give a verbal warning to Cheung notwithstanding his settlement with Loon.
17. Mr Cheung for Chung submitted that the Company should have assessed whether Cheung was suitable to work with others since the incident in 2006. For that purpose, psychological or psychiatrist consultation could have been sought.
18. However, if Loon, being the party concerned in the 2006 incident, believed that what happened to him was the result of misunderstanding, which I accept, I doubt whether a reasonable employer would be in a position to say otherwise. The colleagues also accepted that the settlement of the incident by reference to the apology and the subsequent gesture of Cheung was amicable. If it were to take any of the measures that Mr Cheung suggested, the Company would have had to be sceptical and speculative without regard to the circumstances. In my judgment, the reasonable duty of an employer does not call for that.
19. It matters not whether the Company should have somehow placed Cheung under observation since the incident in 2006 as Mr Cheung for Chung also suggested. The fact was that the working relationship among the colleagues continued to be uneventful in the 6 to 7 months following the incident in 2006. Chung is not able to point to any objective signs in the interim, including the very morning prior to the attack, that would have alerted the colleagues or the Company so that the Company should have taken any step regarding the personal safety of Cheung’s colleagues at work.

***Conclusion***

1. In my judgment, in view of the history prior to the assault on Chung, the risk of Cheung attacking his colleagues, specifically or generally, was neither real nor reasonably foreseeable. The Company as a reasonable employer is not to blame for taking no measure (other than the administration of the verbal warning to Cheung after the incident in 2006) to protect the employees from Cheung in the circumstances.
2. No doubt what happened to Chung was unfortunate and unwarranted. Nevertheless, I must find that he fails to establish the liability of the Company in the circumstances of the present case.

***ORDER***

1. The claim by Chung against the Company is dismissed. Following this event, I make a nisi order that Chung shall pay the Company’s costs of this action, including any costs reserved. Costs shall be taxed, if not agreed, with certificate for counsel. Chung’s own costs shall be taxed according to legal aid regulations. In the absence of application within 14 days to vary, the nisi costs order shall become absolute.

# (Simon Leung)

# District Judge

Mr Ivan CHEUNG instructed by Messrs Francis Kong & Co for the plaintiff upon the assignment by the Director of Legal Aid

The 1st defendant, in person, present

Mr C K WONG instructed by Messrs Woo Kwan Lee & Lo for the 2nd defendant