DCPI 2367/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2367 OF 2008

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BETWEEN

NG CHEUNG SOU CHUN CECILIA Plaintiff

and

SAVILLS PROPERTY MANAGEMENT

LIMITED 1st Defendant

(*withdrawn*)

PROSON DEVELOPMENT LIMITED

trading as POWER REMOVAL COMPANY 2nd Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 4-5 August 2009

Date of judgment: 14 October 2009

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

1. Ng lives with her husband at Venice Court which is one of the buildings in Realty Gardens, Conduit Road, Hong Kong. On 28 September 2006 at about 10 am, Ng left home for shopping in Central. The lift lobby of the building is not situated on the road level. In order to go to Conduit Road, Ng, after leaving the lift lobby of the building, had to first walk up a staircase to the Upper Ground Floor where the car park is.
2. Upon reaching the landing at the top of the staircase, Ng stopped and looked up to the traffic reflex mirror at the ceiling to her right. Seeing no car approach, Ng stepped into the carriageway of the car park. She set foot on what appeared to her to be wooden board or platform of about 20 inches by 30 inches and of about the same height as the curb abutting the curb. Upon that, the wooden board moved away. Ng lost balance and fell backward. After the fall, Ng felt pain in her buttock, lower back and right elbow.
3. It transpired that that wooden platform or board that Ng stepped on was a trolley made of a wooden board with 4 wheels underneath – the kind commonly used by movers. The trolley wheeled away upon Ng setting foot on it and thus causing her to fall.
4. For her injuries, Ng claims damages against the management company, the 1st Defendant, and **Power**, the 2nd Defendant. The claim against the management company was withdrawn early this year. Now between Ng and Power, both liability and quantum are in dispute.

**The accident**

1. In her evidence, Ng confirmed the above account of how the accident happened in her statement. According to her, she yelled for assistance after the fall. Eventually someone came to assist and helped her up to sit on a chair. Ambulance was summoned. While waiting for the ambulance, the caretaker informed her that there was removal or delivery work in progress. Photographs depicting the scene and the wooden trolley in question were referred to.
2. During the trial, it was agreed between the parties that in early October 2006, Ng’s solicitors formally wrote to the management company to complain about the accident with reference to the trolley.
3. Fung was the only shareholder and director of the company operating Power. Fung’s evidence was that on the day in question, Power had a removal job at another building, namely, Vienna Court, but not Venice Court, of Realty Gardens. She stated that her workers had received no complaint or report of any accident that day. She came to be aware of the accident in November 2006. Fung however was not present at the scene of the accident at the material time. She has no personal knowledge of what happened then. She called none of her workers to testify.
4. Among the photographs produced, one (page 171 of the Bundle) indeed depicts Ng sitting on the chair after the accident. Next to her on the landing was the trolley in question, now put up right leaning against the wall and thus revealing its reverse side. Besides the 4 wheels, this side of the trolley actually had the name of Power “實力POWER” painted on it. In court, Fung confirmed that this was one of her company’s trolleys.
5. In my view, Ng’s evidence in respect of the occurrence of the accident was not effectively contradicted. There could be no doubt that the accident happened and I find it happened the way Ng described.

**Liability**

1. Power denies responsibility for the accident. The dispute mainly surrounds two questions: (1) whether Power (through its workers) was responsible for causing or allowing the trolley to be where it was placed; and (2) if yes, whether that or Ng’s choice to step on the trolley caused the accident.
2. The trolley could become dangerous if someone happened to step on it. Fung apparently acknowledged that in her own statement. Mr Tsui submitted that it was reasonably foreseeable that persons in the vicinity might come close to such a danger. These persons included the residents of Realty Garden such as Ng. This gave rise to the duty of care owed by Power to Ng. I agree.
3. Miss Koo submitted that it was not proved that it was the employees of Power who placed the trolley there. Mr Tsui however submitted that no one would have handled the trolley at the material time except for Power’s workers. In the absence of suggestion or evidence that someone other than Power’s workers took the trolley from them at the time and placed it at where it was, I can see the basis for the inference that Mr Tsui asked this court to draw.
4. In my view, it was to begin with the duty of Power to control its trolleys at work. It is for Power to explain how the trolley in question ended up at where it should not be placed. Fung was not in a position to tell and none of the workers involved in that day’s job at Realty Gardens came forward to say anything about that. The primary fact that the trolley was left unattended at where it should not be placed suggests a failure of Power’s system of control over its trolleys at work, if any.
5. Miss Koo emphasized that the accident should still have not happened if Ng had chosen not to step on the trolley when she left the landing. This goes to the question of causation. Miss Koo’s submission presupposes that Ng was or should be aware of it being a trolley and nevertheless chose to step on it.
6. According to Ng, she noticed that the steps of the staircase were covered by wooden boards at the time. From her experience, she thought the management company did that to protect the tiled surface when some kind of removal or delivery work was in progress. While she was standing on the landing at the top of the staircase, Ng could only tell that the wooden board appeared to be a platform, similar to those she had previously seen put by the management company over ground surface under repair. The wooden board abutted the curb of the landing and there was no gap between them. There was no way she could see that it was a wooden board with wheels underneath and therefore a trolley in reality. I believe her.
7. Miss Koo also suggested that there was room to her right on the landing where she could have made her way forward without stepping on the trolley. According to Ng and the photographs, flowerpots were placed to her right on the landing. But more importantly, if, and as I find above, Ng was not aware of the danger presented by the wooden board in front of her, she would have had no reason to avoid it. What she did was not extraordinary in the circumstances.
8. Considering all the evidence, I am satisfied that the danger was created by the trolley in question being left unattended at where it should not have been placed out of the negligence of Power through its workers. I find that this caused the accident to Ng.

**Contributory negligence**

1. In view of the above findings and that Ng did nothing extraordinary in making her way forward, I do not think that Ng should be to blame for contributing to the accident.

**Quantum**

1. The ambulance sent Ng to the hospital. She was found to have suffered from a small haematoma (1 cm) on her occipital region and right elbow dislocation. Closed reduction of her elbow dislocation was performed. The elbow was put in plaster for immobilisation for a week.
2. Ng was discharged on the following day. She was followed up for managing the elbow dislocation and right shoulder pain. The treatments included 26 sessions of physiotherapy until March 2007. She had also consulted bonesetter, acupuncture therapist and chiropractor.
3. Ng complained about difficulty in getting to sleep. There was occasional numbness in the right arm and hand as well as shoulder pain. She had ceased her pre-accident yoga and aerobic exercises. She could not lift heavy objects. Her husband and she had hired part-time domestic helper after the accident. The part-time domestic help was temporary and terminated about 2 months later.
4. In court, she gave examples of inability to handle household work such as lifting the mattress or moving heavy furniture. But in my view, these are heavy tasks for a single person even if has not been injured. She could do house cleaning work now. Cooking is not a substantial concern as she and her husband mostly ate out or had takeaway meals even prior to the accident.
5. In early 2008, Ng was examined by orthopaedic specialist, Dr Daniel Yip. Dr Yip produced his report dated 20 February 2008. Power did not seek to rely on any other expert medical evidence.
6. In the opinion of Dr Yip, the treatment received by Ng for her elbow dislocation was standard and appropriate. She has achieved maximal medical improvement. Her loss of some terminal extension of the right elbow and terminal flexion will not be of any clinical significance due to the compensatory dexterity of the adjacent joint of the elbow. The impairments are likely to be permanent. Dr Yip opined that Ng has recovered quite well. It should not affect driving. There may be mild decrease in efficiency in certain types of household chores.
7. Given her good recovery, Dr Yip estimated Ng’s impairment to be 2% of the whole person. There will be a 2% loss of her earning capacity for the occasional pain.
8. In March 2009, Dr Yip added that had Ng been in office-based employment, reasonable sick leave period should last for 8 weeks.
9. Ng revealed that she had the history of breast cancer in 2002. Dr Yip’s report also recorded the surgery, treatments and therapies that she had received as a result. However, she had no previous problem with her right elbow or upper limb. There is also no suggestion of any effect of this past cancer condition on her right elbow or upper limb.

***Pain, suffering and loss of amenities (PSLA)***

1. Ng claims damages for PSLA in the sum of HK$280,000. Mr Tsui relied on *Li Moon Chai v Leung Shu Man & Ors*, HCPI 48/2007 (10/9/2008) and *Ho Bing Cheung v Lam Yin Yuk trading as Ocean Fast Food & Ors*, DCPI 66/2004 (3/12/2004). Miss Koo for Power also referred to *Li Moon Chai* but submitted that the award in the present case should be HK$100,000.
2. *Li Moon Chai* was a case of dislocated elbow without fracture. The period of hospitalisation, diagnosis and treatments in that case were quite similar to those in the present case. However Mr Tsui submitted that that is not a reliable comparable for two reasons: first, the age of the plaintiff there is unknown; and secondly, whether the injured hand in that case was his dominant hand is also unknown.
3. In my view, these unknown features do not undermine the value of that case as a comparable. The plaintiff in that case was a construction site worker who fell from height during work. The occupational therapist’s report in that case recorded that his pre-accident work effectively required him to use both hands, whichever was his dominant hand. He was given more than 1 year of sick leave. The medical experts assessed that he had no external deformity or muscle wasting or spasm. They agreed that he should be able to return to his pre-accident job at construction sites. The residual pain and stiffness would partly affect his working performance and endurance. The permanent impairment of the whole person amounted to 4%. The Medical Assessment Board assessed his loss of earning capacity to be 2%. HK$150,000 was awarded.
4. Mr Tsui preferred *Ho Bing Cheung* as a comparable. Indeed the plaintiff in that case was of the same age at the time of the accident as Ng, i.e., 61 years old. He also got his dominant hand injured. However, the injury was displaced fractures of the right wrist. There were also complications after discharge from the hospital and as to which the medical experts apparently had divergent opinion. The comparables referred to in that judgment also involved fractured wrists. Apart from tightness and numbness of his right fingers, the plaintiff there also had occasional sharp pain at his back and bilateral shoulder pain. There was bilateral calf cramps in the morning or prolonged sitting. The wrist had healed with collapse, impaction and deformity. HK$220,000 was awarded.
5. One hardly expects precision in the process of comparing the case under consideration with apparently similar decided cases. Considering the medical expert opinion, the personal circumstances of Ng and the cases referred to by counsel, I conclude that HK$150,000 should be a reasonable award for Ng under this head of claim. I make this award accordingly.

***Loss of earnings***

1. As mentioned above, Ng was 61 years old at the time of the accident. According to her, she had worked full-time since graduation from Form 6 in the 1960’s. She got her MBA qualification in the 1980’s. In 1985, she became the Regional Office Manager of an Italian company. She remained as such until she was diagnosed to have breast cancer in 2002. She then stopped working for the treatment.
2. Ng and Angela Chan came to know each other on business in about 1991 or 1992 when Chan who was then working for a machinery trading company. Chan had subsequently changed to other fields of business but Ng and Chan kept in touch occasionally.
3. Recovering from cancer by 2005, Ng intended to resume working. Partly because she was reluctant to travel a lot on business and partly because she was still attending follow-up treatment here, Ng was yet to secure a suitable job.
4. It was in about mid-June 2006 when Ng and Chan came to talk on the telephone. In about a month later, Chan approached Ng and offered her the position as General Manager at her education consultancy company. After an informal interview, a written offer was made which Ng accepted in early September 2006.
5. According to the letter of employment, Ng would be responsible for supervising the daily operation of Chan’s company, preparing agreements with partner institutes and organising recruitment activities. Ng would not be required to travel on business. Her salary would be HK$35,000 with a month’s pay as bonus. This, according to Chan, was lower than what Ng used to earn from her previous jobs. The employment was supposed to commence on 1 November 2006.
6. However, in the same month after accepting the job offer, Ng met the present accident. According to Ng, by early to mid-October 2006, she still had residual pain from her injuries and was concerned about the treatments that would still be necessary. She had therefore asked Chan if the commencement of her employment might be postponed. Chan replied in the negative. Chan confirmed that in court and explained her difficulty then. The office premises had already been rented. She needed Ng to be in place as agreed to help setting up the new office. Much work had to be done in preparation for the intake of students by the partner institutes in the following February.
7. In this respect, the case put on behalf of Power was that the job offer by Chan to Ng was a mere fabrication. But notwithstanding the various attempts by Miss Koo to discredit them, Ng and Chan impressed me as truthful witnesses. I accept their evidence in this respect.
8. Considering the evidence, I believe that but for the accident, Ng would have managed the job at Chan’s company. Chan was certainly confident in Ng. As mentioned above, according to Dr Yip, reasonable sick leave for Ng would not have expired by the time when Ng was supposed to commence her new employment. As I accept, attempt to postpone the commencement date had been made but unsuccessful. It was due to the accident that Ng lost this job opportunity and therefore the income that she should have obtained from it.
9. Should Ng have mitigated her loss by seeking alternative employment after losing the job at Chan’s company and the reasonable sick leave expired at the end of November 2006? Legally, the answer would be yes. But considering Ng’s age and circumstances, I wonder whether this would have been easy. According to Ng, she had in fact made enquires with her friends and former clients for job opportunities since the accident but had not been successful. I accept her evidence.
10. In any event, though she expressed her intention to work until 65 years old, Ng is confining her present claim to the loss of earnings for 1 year only. Considering the circumstances of this case, I find this to be reasonable. This would be 1 year’s salary from the job at Chan’s company and the contractual bonus in the amount of another month’s salary. Inclusive of the MPF benefits, which is not in dispute, the amount would be HK$(35,000 x 13) x 1.05 = HK$477,750.

***Loss of earning capacity***

1. HK$80,000 is claimed on the basis that Ng would be subject to a handicap in the labour market as a result of her elbow condition. Considering the medical expert opinion and the personal circumstances of Ng, I am of the view that this is inappropriate to make an award under this head.

***Miscellaneous special damages***

1. The following items of expenses were agreed during the trial:
   1. Medical expenses at government hospital in the total sum of HK$2,460; and
   2. Salaries and employee’s insurance for the temporary domestic help in the total sum of HK $5,056.50.

***Expenses on bonesetter, acupuncture, chiropractor***

1. Besides conventional treatment, including 26 sessions of physiotherapy, Ng had sought various other treatments during the following periods:
   1. 33 sessions of bonesetter’s treatment (10/2006 – 1/2007) costing in total HK$9,024;
   2. 5 sessions of acupuncture (9/2007) costing in total HK$1,500; and
   3. 12 sessions of chiropractic (11-12/2008) costing in total HK$4,500.
2. The above expenses are evidenced by the relevant receipts. I agree with Mr Tsui that there is no hard and fast rule that expenses for unconventional treatments not recommended by doctors would not be allowed. In court, Ng explained that she attempted various treatments when she was not satisfied with the effect and progress. According to Dr Yip in February 2008, Ng would still experience occasional pain. On the whole, I find the above unconventional treatment expenses to have been reasonably incurred.

***Travelling***

1. The amount of travelling expenses claimed is HK$7,472. This is partly evidenced by taxi receipts. In court, Ng explained that these were incurred for visiting different venues for treatments. But she admitted that some taxi fares might have been incurred for her to go to the supermarket. In view of the available evidence, I am only prepared to allow a reasonable sum for the travelling expenses. This will be a lump sum of HK$5,000.

***Summary***

1. In summary, the quantum is assessed as follows:
   1. PSLA HK$150,000.00
   2. Loss of earnings incl. of MPF HK$477,750.00
   3. Miscellaneous special damages

Medical expenses at government hospital HK$ 2,460.00

Bonesetter’s fees HK$ 9,024.00

Acupuncture expenses HK$ 1,500.00

Chiropractic expenses HK$ 4,500.00

* 1. Travelling expenses HK$ 5,000.00
  2. Part time domestic help HK$ 5,056.50

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Total: HK$655,290.50

1. Ng is entitled to interest on general damages (PSLA) at 2% per annum from the date of writ until today and interest on special damages at half judgment rate from the date of accident until today.

**Order**

1. There be judgment against Power in the sum of HK$655,290.50 with interest as aforesaid. Interest on the above sum shall run from today until payment at the judgment rate. I make a nisi order that Ng shall have costs of this action against Power, including any costs reserved, which shall be taxed, if not agreed. For clarity, I certify the engagement of counsel. In the absence of application within 14 days, the costs order shall become absolute.

Simon Leung

District Judge

Mr Raymond TSUI instructed by Messrs Kitty So & Tong for the Plaintiff

Miss KOO Yeuk Lan instructed by Messrs Quan & Co for the 2nd Defendant