## LA/MPI/16589/2005 (AM05)

## DCPI 2594/2007

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2594 OF 2007

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BETWEEN

Chow Po Plaintiff

and

Chow Hau Man （鄒考文）trading as

Nice Year Metal Co. (沛年五金公司) Defendant

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Coram: H.H. Judge Chow

Dates of Hearing: 28th and 29th December 2009

Date of Handing Down Judgment: 8th March 2010

Judgment

1. In this action the Plaintiff claims for damages for personal injuries he sustained in the course of his employment with the Defendant, due to the negligence and/or breach of the implied contract of the employment of the Plaintiff and/or breaches of statutory duties on the part of the Defendant in an accident which took place at the premises known as Sun Hing Iron Factory (“the Factory”) situated at Tuen Mun, New Territories at about 5.30 p.m. on 14.1.2005.
2. On 14.1.2005, the Plaintiff was an employee of the Defendant. On that day he went to the Factory together with the Defendant, a driver called Ah Tat and a co-worker Mr. Chow Ching Cheung. At about 5.30 p.m., the Defendant caused a crane lorry to send three metal boards to the Factory. The dimensions of two metal boards were 3 feet x 6 feet whilst one metal board was 10 feet x 6 feet. The metal boards were tied up at one end by wires. The crane of the lorry was not able to pull the metal boards to a heap of scrap metal nearby. The Defendant instructed the Plaintiff to lift the other end of the metal boards, so that the crane could move the metal boards to the heap of scrap metal. The Defendant walked away, and did not supervise the work. Chow Ching Cheung did not assist the Plaintiff. He just stood behind him. When the Plaintiff was lifting up the other end of the metal boards, the crane arm was also lifting up the metal boards at the same time. The metal boards toppled over and hit the right leg of the Plaintiff, thereby causing injuries to him (“the Accident”).
3. The Defendant testified himself. He called no other witness to give evidence on his behalf. He did not put forward any different version of facts to show how the Accident happened.
4. The first question I have to decide is: was the Defendant the proprietor of the “industrial undertaking” in question? Section 2 of the Factories and Industrial Undertakings Ordinance (“the Ordinance”) defines “Industrial undertaking” to include:-

“(f) the loading, unloading, or handling of goods or cargo at an …… warehouse ……;

1. the carriage of coal, building materials, or debris;
2. any premises or site in or upon which, and the machinery, plant, tools, gear and materials with which, any of the foregoing industrial undertakings is carried on.”

The Defendant, at the material time, was in direct control of the unloading of the metal boards. His business was to deliver the metal boards from the place of collection to the place of sale and then to unload them by using a crane. He was, according to section 2 of the Ordinance, the proprietor of the industrial undertakings, because he was the person for the time being having the management or control of the business carried on in such an industrial undertaking. Section 6A(1) and (2) of the Ordinance imposes a statutory duty upon the Plaintiff, who was the proprietor of the industrial undertaking, to ensure the health and safety of all persons employed by him at the industrial undertaking, in so far as is reasonably practicable.

1. Under common law, the contract of employment between an employer and an employee contains an implied term that the employer would take reasonable care for the safety of the employee (*Wilsons and Clyde Coal Co. Ltd. v. English* [1938] AC 57, HC). This level of duty is the same as that of an employer’s common law duty of care in the law of negligence. Such duty includes the provision of a safe system of work.
2. The Defendant did not give the Plaintiff any warning about the risks in carrying out the Defendant’s instruction. He also walked away after giving his instructions. So he did not supervise the Plaintiff in carrying out the work. If he had supervised the work, he would have detected any risk that may come and warn the Plaintiff of it. He did not provide adequate and competent fellow staff to assist the Plaintiff. Mr. Chow Ching Cheung was there, but he shrinked away from giving assistance to the Plaintiff. All these factors contribute to the occurrence of the Accident.
3. The Plaintiff was instructed to do the work by the Defendant. He did what his employer told him to do. One cannot impute contributory negligence on the Plaintiff when he was just following his employer’s instructions: *Wong Kwun Sang by Yeung Chun Ha, his wife and next friend v. Yiu Woon Ming & Ors.* HKPI 633 of 2004.
4. The Plaintiff said that his employer asked him to work. If he did not do so, he would be dismissed. He just did what the employer asked him to do. If he had known that the metal boards had not been tightly bound up, he would not have gone near the metal boards. So when he went up to the metal boards he did not know that there would be a problem with the metal boards. There was no evidence to refute what passed his mind at that time. It must be true that he was not aware that there would be a problem with the metal boards before they toppled over. There cannot be any contributory negligence on his part.

Injuries

1. The Plaintiff’s right leg was cut (the cut wound being 5cm long) and crashed seriously. His right distal tibia was fractured. He was hospitalized for 12 days, during which repeated operations for wound debridement and fixation of fracture were done. He underwent 3 surgical operations, 2 of which were major orthopaedic reconstructive surgeries. An intra-medullary nail and 4 cross locking screws were affixed to the bone. After discharge from hospital he had to regularly attend out-patient clinic for follow-up treatments and rehabilitation. He was granted sick leave until 16.10.2006. There is still an intra-medullary nail in his leg. He feels pain and weak for prolonged standing or walking. He is not able to carry heavy objects. His right leg has multiple surgical scars.
2. Dr. Poon and Dr. Lam opine that he is still fit to work as a general labourer. Dr. Poon observed that his ability to handle heavy lifting and prolonged walking is definitely impaired to some degree. The Employees Compensation (Ordinary Assessment) Board assessed that the loss of earning capacity permanently caused by the injury is 3%.

Pain, suffering and loss of amenities (“PSLA”)

1. In *Chong Yiu Tat v. Fong Man Chi*: HCPI 742 of 2001, the Plaintiff fell from height, causing a fracture of his distal tibia involving the ankle joint. After surgery and rehabilitation he recovered with residual pain and stiffness, with a chance of degenerative authorities. He could not return to his pre-injury job of installing air-conditioners at construction sites. He can only do light duty jobs; he could only work as an indoor cleaner or carpark attendant. The court awarded him $350,000. In light of that decision case, the present claim of $350,000 is reasonable.
2. The cases cited by the Defendant do not involve fracture of the tibia; hence the injuries sustained by the plaintiffs in those cases are not similar to the injuries of the present case. So these cases do not give assistance for the purpose of evaluating PSLA.

Pre-trial loss of earnings

1. The Plaintiff was earning $8,580 per month before the accident. Sick leave was granted from 14.1.2005 to 16.10.2005. Both medical experts agree that the sick leave was reasonable. The Plaintiff’s counsel ask for the court to grant him 8 months grace period for securing alternative employment. The Plaintiff submits that “Thereafter i.e. from about 15 June 2007, it is conceded that P should be find alternative employment which does not involve heavy lifting, e.g. general worker or dish-washer, earning about $5,000. …… Where a plaintiff have not secured employment after expiry of sick leave and any grace period, the court should calculate post-trial loss of earnings based on a notional salary …… The Plaintiff is still fit to work until the normal retirement age of 65.”
2. After the sick leave period ended on 16.10.2005, the Plaintiff did not do any work.
3. The issue I have to decide is: did the Plaintiff make any attempt to find a job which he can physically handle, such as general worker or dish washer? This is not clear. Under paragraph 18 of his witness statement dated 10.2.2009, he said that because of the leg problem and all along he had not been able to look for a new job, he had to stay at home all along. In the “Revised Statement of Damages” (dated 9.5.2009), it is stated, under the heading “Past Loss of Earnings”, “(iii) The Plaintiff is illiterate and not young. He is still walking with a limp and unable to carry heavy loads. In fact, the accident injuries and disabilities have effectively rendered him unable to return to the labour market. Therefore, he remains out of employment since the date of accident.” According to this paragraph, the reason he was out of employment is due to the accident injuries. There is no evidence that he did actually attempt to look for a job.
4. In his witness statement he went into some details on how he got his job from the Defendant. If he had attempted to find a job or jobs after the sick leave it would not have been difficult for him to say so in his witness statement. Furthermore, it would not be difficult to find a job as a general worker or dish-washer (which only yields a low monthly salary, say $5,000). I am not satisfied that he has discharged the burden of proof that he did attempt to find a job which he can physically handle. Hence there cannot be any financial loss to him. I adjudge that there cannot be any pre-trial loss of earning (save for the sick leave period), because there was no earning to be made since he did not have any job to do. The pre-trial loss of earnings is $90,961.83 (($8,580 x 10 + $8,580 x 3/31) x 1.05 (MPF)).

Future loss of earning

1. The Plaintiff has to show by way of evidence that there will be a loss of earning in the future. But he has not worked for 5 years, and during the trial he did not adduce evidence that he will have a job to do. There is no evidence before me that there will be an earning after the trial, and because of the accident injuries there will be a loss of earning suffered by him. Therefore I will not make any award under this head of claim.

Loss of earning capacity

1. In Mocliker v A Reyrolle & Co. Ltd [1977] WLR 132, the Court said:

‘Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether there is a “substantial” risk or is it a “speculative” or “fanciful” risk …… If the court comes to the conclusion that there is no “substantial” or “real” risk of the Plaintiff losing his present job during the rest of his working life, no damage will be recoverable under this head’.

The Applicant is not working at the date of the trial. In fact from the expiry of the sick leave up to the trial day, he did not have any work. Hence there is no risk for him to lose any job, because he does not have a job at all. So there cannot be any award for him under this head.

Wife’s loss of earning

1. There is virtually very little evidence in support of this claim. So I dismiss it.

Special damages

1. Medical expenses at $3,550 and traveling expenses at $5,270 have been conceded by the Defendant.
2. The Plaintiff claims $5,000 for tonic food. The Defendant concedes a figure of $3,000. There is scanty evidence to support this claim, such as the kind of tonic food taken by the Plaintiff, and the reason for taking such kind of tonic food. I would just allow a figure of $3,000 for this claim.

Salary payment

1. The Defendant submits that a total sum of $27,720, being salary payments, should be deducted from the award made to the Plaintiff. This deduction was not raised in the Answer to the Revised Statement of Damages. This should have been taken into account in the Employment Compensation payment. I would not make any deduction for this.
2. A sum of $65,000 has to be deducted from $90,961.83 as this was paid by the Defendant to the Plaintiff under SCEC 225 of 2006 as the employee’s claim. The balance is $25,961.83.

Summary of quantum

1. PLSA $350,000.00

Pre-trial loss of earnings $25,961.83

Post-trial loss of earnings Nil

Loss of earning capacity Nil

Special damages $8,820.00

Tonic food $3,000.00

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$387,781.83

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1. I order that the Defendant do pay, within 14 days from today, to the Plaintiff the sum of $387,781.83 ($350,000 + $25,961.83 + $8,820.00 + $3,000) with interest: interest on the sum of $350,000 at 2% per annum from 17.12.2007 to7.3.2010; interest on the sum of $37,781.83 from 14.1.2005 to 7.3.2010, at 50% judgment rate; interest on $387,781.83 from 8.3.2010 to satisfaction at judgment rate.

Costs

1. I make an order nisi, to be made absolute in 14 days’ time, that the Defendant do pay costs of this action to the Plaintiff, to be taxed, if not agreed, with certificate for Counsel. The Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.

( S. Chow )

District Judge

The Plaintiff: represented by Miss Elizabeth Yung, instructed by Messrs. Cheng, Yeung & Co., Solicitors.

The Defendant: represented by Mr. Henry Fung L.W., instructed by Messrs. S. Cheng & Yeung, Solicitors.