DCPI 2627/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2627 OF 2008

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BETWEEN

CHENG KAI KIT (鄭繼杰) Plaintiff

And

KWONG KAM TIM MARBLE COMPANY

LIMITED (鄺錦添雲石有限公司) 1st Defendant

FUNG YUEN CONSTRUCTION COMPANY

LIMITED (逢源建築有限公司) 2nd Defendant

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Coram: His Hon Judge Leung in court

Date of hearing: 1-3 September 2009

Date of judgment: 16 November 2009

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

1. The accident in the present case happened on 22 February 2005 in a construction site at Beas Stable, Sheung Shui, New Territories. In the course of climbing down a wooden ladder, **Cheng**, the Plaintiff, fell and was injured. He sues **KKT**, his employer and the 1st Defendant, and **FY**, the principal contractor and the 2nd Defendant for damages. The action was commenced in the High Court but was transferred to the District Court in December 2008.
2. At the material time, Cheng was a levelling worker (平水員). As such, Cheng’s work involved making markings on concrete surfaces (in Chinese”彈墨”) to enable other works to be carried out on the surfaces according to the markings.

**Cheng’s pleaded case**

1. Cheng’s case is that at about 3:30 pm that day, his supervisor, Leung Hoi (“**Leung**”), instructed him and his co-worker by the name of Ah Kong to make markings on the top of the boundary wall surrounding the tennis court under construction on the roof of the clubhouse. Leung instructed Cheng to make use of a wooden ladder placed nearby (“**the Ladder**”) for work. Cheng did as instructed.
2. The pleaded case that Cheng needs to prove is that:

“…… While the Plaintiff intended to fetch a tool on the ground, he climbed down the Ladder and was resting on the fourth rung of the Ladder, **the said rung suddenly became loosened causing the Plaintiff to lose balance and fell** from height (“the Accident”) and thereby sustained serious injuries to his lower back.”

(*Emphasis added*)

**Issues in dispute**

1. According to the pleadings, the following issues are in dispute:
   1. how the accident happened;
   2. as the employer, whether KKT was in breach of its implied contractual duty of care and/or the statutory duty under section 6A of the Factories and Industrial Undertakings Ordinance, Cap.59;
   3. whether KKT and/or FY was negligent and/or in breach of the occupier’s liability;
   4. whether Cheng was negligent in causing or contributing to the accident; and
   5. the quantum of damages.

**The accident**

1. Cheng gave evidence and adopted his account in his statement of what he was doing and how the accident happened at the material time. The boundary wall in question was about 250-300mm thick and just less than 2 metres in height. With the help of the photographs of the site produced during the trial, it is understood that his work then was to mark the position of the iron fence then to be erected along the top of the boundary wall. By leaning the Ladder against the side of the boundary wall inside the tennis court area, Cheng climbed up to where he had to carry out his work.

*What Cheng was doing?*

1. Leung gave evidence. Besides confirming that he instructed Cheng to carry out the work as Cheng said, Leung said that upon hearing someone scream, he turned around and found Cheng lying on the ground in agony. Leung and Ah Kong (Cheng’s co-worker) helped Cheng up to rest.
2. By pleading, KKT and FY put Cheng to proof of the accident. During trial, Mr Lim for KKT and FY raised doubt as to what exactly Cheng was doing at the time of the accident. The suggestion was that he was not supposed to be working outdoors at the time when it was drizzling.
3. Wong Hon Kuen (“Wong”), the supervisor of KKT, gave evidence that due to the weather condition, he and the workers had stopped working and retreated indoors. Reference was made to the precipitation record of the Hong Kong Observatory. It recorded traces of rain on that day.
4. Mr Lim also pointed to the discrepancy between the evidence of Cheng and that of Leung in respect of the spots where Cheng had to carry out his work that day.
5. Considering the evidence in this respect, I find that Cheng was in the course of his work as instructed by Leung at the time and the accident happened when Cheng was descending from the top of the boundary wall along the Ladder.

*What caused Cheng to fall?*

1. Cheng’s pleading suggests that it was the loosening of the 4th rung of the Ladder which caused him to lose balance and to fall. But it transpired that Cheng did not really know that. Cheng’s evidence was that he was facing the Ladder when he descended. When he moved his foot from the 4th to the 3rd rung of the Ladder (counting from the bottom), he slipped (or “跣腳” as he put it) and fell.
2. Cheng gave the same account of a slip and fall accident in his report to KKT and his declaration to the Labour Department in May 2005. The accident report issued by the Labour Department in June 2005 also recorded that Cheng detected no defect in the structural members of the Ladder and was not sure whether the rung had been broken at the time of the accident. The accident was also described as a slip and fall case.
3. According to Leung in court, after the accident, he observed that the 3rd rung of the Ladder (counting from the bottom) was loosened. He could see the mortise and the deformed tenon. The 2nd rung was a bit loosened but not detached. He said that he informed Cheng of his observation about the loosened rung of the Ladder at the very night of the accident. But Cheng could not confirm that.
4. I find that Leung did not do so in the night of the accident he alleged. Otherwise, Cheng would have stated that in his subsequent report to KKT and his declaration to the Labour Department. In particular, the declaration recorded that the investigating officer actually asked him specifically about this during the interview.
5. Based on the report of Cheng mentioned above, KKT also reported a slip and fall case in Form 2 in March 2005. But Leung explained that he had reported to Wong about the loosened rung of the Ladder which caused Cheng to fall. But Wong allegedly told him that this should not be reported to the Labour Department.
6. Leung’s such allegation about what Wong said to him was first mentioned in court. His explanation was that he had mentioned this to Cheng’s solicitors and it was the solicitors who had somehow failed to include that in his statement.
7. Wong denied such allegation, suggesting that he had no reason to suppress the truth. The fact was that Wong must have reported the accident to KKT which also filed Form 2 within 10 days of the accident. Insofar as compliance with an employer’s duty to report the accident is concerned, whether to state that the fall was caused by the condition of the Ladder would not have been material. Insofar as triggering Cheng’s right to claim employees’ compensation is concerned, the report filed also sufficed. Wong also explained his concern about the duty to report to the insurance company. I believe him.
8. Leung could only see the condition of the rungs of the Ladder after the accident had happened. He spotted nothing wrong about the Ladder when instructing Cheng to use it. According to Cheng, he had also inspected the Ladder before use and discovered nothing wrong about it. Prior to the accident, Cheng had been working on the boundary wall for at least an hour and during which he had climbed up and down the Ladder many times uneventfully.
9. In the circumstances, I do not believe it had in fact occurred to Leung or Cheng that the condition of the Ladder could be the cause as opposed to the consequence of the accident. This explains why Leung did not mention to Cheng about this as he alleged. Cheng also made no mention of that in his report to KKT or the Labour Department.
10. I find that attributing the occurrence of the accident to the condition of the Ladder, as if it was defective prior to the accident, was an afterthought on the part of Leung and Cheng.
11. Was it because the rungs of the Ladder were loosened that caused Cheng to fall or was it Cheng’s slip and fall that damaged the rungs? Mr Lim suggested that either scenario was possible and one cannot tell on the basis of available evidence on the balance of probabilities. Cheng has not proved that the accident was caused by the defective condition of the Ladder. I agree.
12. I find that this was a slip and fall accident when Cheng was descending the Ladder. It is on this basis that I proceed to consider the question of liability of KKT and FY.

**Whether KKT or FY was in breach**

1. The existence of the various duties on the KKT and FY respectively is not in dispute. The issue is whether either or both of them were in breach. This depends on whether KKT or FY should have taken any reasonable precaution against a slip and fall accident like the present one.
2. In respect of each cause of action, Cheng alleges the same particulars. Broadly I group them into the following aspects:
   1. safe access to the place of work;
   2. the condition of the Ladder;
   3. safety equipment, etc; and
   4. the condition of the ground.

*Access to the place of work*

1. I first consider the allegation of KKT and FY. KKT and FY argue that Cheng could have gain access to where he worked from the bamboo scaffolding outside the building. Cheng disputes that the bamboo scaffolding had been erected up to that level at the time of the accident. Cheng also argues that one could not have reached the top of the boundary wall from such bamboo scaffolding in any event.
2. There seems to be no dispute as to the existence of a bamboo scaffolding on the external wall of the building under construction at the time. Reference was made to the photographs of the building under construction and the sketch that depict the scaffolding. The dispute is whether the bamboo scaffolding had by the time of the accident been erected to the level of the boundary wall as depicted in the photographs.
3. Mr Lim criticised Cheng’s evidence in this respect. But I am not impressed by looking at the photographs and the sketch that a worker could easily reach the top of the boundary wall from the bamboo scaffolding.
4. Even assuming one could have reached the boundary wall where Cheng had to work from the external bamboo scaffolding, I do not think that Cheng should be to blame for not using this as the mean of access. The fact was that he had specific instruction from Leung, his superior then, to use the Ladder. Cheng would have had no reason to query or not to follow the instruction. It was not really a matter of Cheng’s choice for the sake of his convenience as Mr Lim suggested.
5. After all, using a ladder to get to a height of less than 2 metres from the inside of the building did not appear to be a dangerous way, whether by itself or relative to climbing from the bamboo scaffolding outside the building.
6. Further, it was also the evidence of Leung that knowing Cheng had a previous accident in 1998, he hired Cheng upon the understanding that Cheng would not be assigned to carry out work that required climbing of scaffolding or working at height.
7. In my view, whether or not Cheng could have gained access from the bamboo scaffolding outside the building to where he had to work is not really material in the circumstances of the present case.
8. Now turning to the allegation of Cheng. It is alleged on Cheng’s behalf that rather than instructing or allowing him to use the Ladder, KKT and FY should have provided an aluminium scaffold with working platform for Cheng to carry out his work on the top of the boundary wall.
9. In this regard, Wong explained his understanding that the regulations do not require the provision of such scaffold or working platform for the height of the boundary wall in question. This sounds right.
10. But in my view, whether an aluminium scaffold with working platform as alleged could have been provided is also immaterial in the circumstances of this case.
11. This was not an accident where the worker fell from the top of boundary wall in the course of his work. Nor was this an accident where the worker had to stand on a ladder in order to work at height and during such work he fell from it. In either of these cases, perhaps a working platform could have prevented possible fall from height.
12. In the present case, Cheng fell in the course of descending from where he had to work. If a working platform had been provided, Cheng would still have had to climb up and down it. As far as the risk of falling is concerned, there is no suggestion or evidence that the risk associated with climbing up and down an aluminium scaffold and that with climbing up and down a ladder would be materially different.
13. It was suggested that with the aluminium scaffold and working platform, there would have been no need for Cheng to climb down to fetch his tool and the chance of slip and fall could have been minimised. But as Cheng inevitably would have had to climb up and down, whether and, if yes, when he would have slipped and fallen during the climbing, whether from a scaffold or a ladder, was a matter of chance.
14. For the above reasons, neither side’s allegations in this respect has any bearing on the issue of causation of the accident in the present case.

*Condition of the Ladder*

1. There is no dispute that the Ladder did not belong to KKT or FY. It was alleged that KKT and FY had failed to ensure that the Ladder was safe. As discussed above, Cheng has not proved that the rungs of the Ladder were in fact loosened before the fall and thus causing the fall.
2. Even assuming that Cheng has proved that the rungs came off when he stepped on them, obviously the defect was not patent to both Leung and Cheng. In Cheng’s case, he had inspected the Ladder before use and had climbed up and down the Ladder uneventfully for many times before the accident. Mr Lim submitted that KKT and FY should not be liable for the latent defect of the Ladder and therefore risk of danger not apparent upon reasonable inspection. I agree.
3. I also do not think that reasonable duty of care of the part of KKT and FY would have entailed the provision of a ladder free from latent defect. Therefore the fact that KKT and FY did not provide a ladder and the fact that the Ladder was not provided by them make no material difference to the occurrence of the accident.

*Safety equipment, etc*

1. Cheng admitted that KKT had provided him with a safety helmet as well as a safety belt. At the time of the accident, he did use such equipment. In particular, he kept the safety belt anchored when he was working on the top of the boundary wall. It was because he had to climb down the Ladder did he detach the safety belt from the anchorage.
2. If the suggestion is that there should somehow be anchorage for the safety belt during the climbing process, there is really no evidence of the precise device that is being suggested. I cannot accept that devices such as independent lifeline and fall arrester are what an employer or contractor in charge would have been reasonably expected to provide for a wall of less than 2 metres high in the present case.
3. KKT and FY were criticised for failing to provide safety boots for Cheng. But this is immaterial because Cheng admitted that he was in fact wearing safety boots at the time of the accident.
4. Mr Wong for Cheng criticised KKT and FY for leaving it to the workers to decide how to carry out their tasks. In his evidence, Wong explained the training and supervision provided to workers in general. Cheng had over 10 years of experience in his field. As I find nothing unsafe about using a ladder to get to where Cheng had to work, I do not see what kind of training, supervision or warning could have prevented an accident like that in the present case.
5. The various other allegations about the system of work particularised in the pleading were neither seriously pursued nor established as a matter of fact.

*Condition of the ground*

1. Upon the fall, Cheng’s waist was allegedly hit against the metal parts of his safety belt. The real complaint here is that his low back was also hit against the scrap and iron bars allegedly on the ground at the time. The condition of the ground was said to be an obvious hazard to the workers working on the top of the boundary wall and those who worked on the ground.
2. I can understand the argument, insofar as the workers or other visitors on ground are concerned. But I do not see how the condition of the ground was instrumental and causative of the slip and fall accident in the present case. I also do not believe that it is arguable that but for the condition of the ground, a worker who falls would not have got injured.

*Conclusion*

1. On balance, I am not satisfied that liability is proved.

**Contributory negligence**

1. If KKT or FY should somehow be held liable for the accident, then I see nothing in the conduct of Cheng at the material time which would have amounted to his own negligence contributing towards the occurrence of the accident.

**Quantum**

1. For completeness, I proceed to consider the quantum.

*The 1998 accident*

1. There is no dispute that Cheng had a previous accident in September 1998. In that accident, he fell from 3 feet high during work with his back hit against a hard object.
2. According to the medical report of the hospital, physical examination after the 1998 accident showed mild tenderness at Cheng’s lumbosacral spine with mild limitation of spinal motion. There was no neurological deficit. X-ray already showed degenerative changes of the spine. This was confirmed by the MRI which also showed prolapse of L3-4 and L4-5 discs. He was said to have responded slowly to treatment and complained of persistent back pain. He was followed up half-yearly from September 2001 to May 2005. He was then advised to undertake light manual work as his physical condition was unable to cope with heavy physical demand. The medical assessment board then assessed his loss of earning capacity to be 10%.

*The present accident*

1. After the present accident, Cheng felt severe pain over the lower back. After a few sessions of bonesetter’s treatment, the pain did not improve. He went to the Accident and Emergency Department of the hospital 4 days after the accident. Examination there showed lower back tenderness. X-ray of the lumbosacral spine showed no obvious fracture. He was treated with analgesic. He attended follow-up treatment on 6 occasions until April 2005. Physiotherapy was also provided.
2. Cheng had been referred to the Orthopaedic & Traumatology Department of the hospital where he was diagnosed to have persistent low back pain with impaired light touch sensation over L5 and S1 dermatone on the right side. X-ray of the lumbosacral spine showed no serial change compared with those taken after the previous accident in 1999. Analgesics were prescribed and physiotherapy continued. Occupational therapy also commenced.
3. MRI done in January 2006 revealed L3-4 and L4-5 disc herniation on the left side with left L4-5 nerve root impingement. However, the doctor noted that Cheng’s symptoms were all along on his right side.
4. Because of the static progress on the therapies provided, Cheng was referred to the medical assessment board for assessment. Both the assessment in May 2006 and the review of assessment in August 2006 came to the same conclusion of 0% loss of earning capacity. Remark was made in the certificates by the board explaining that the assessment had taken into consideration of the loss of earning capacity due to the injury sustained in the 1998 accident.
5. Sick leave had been granted to Cheng up to mid-May 2006. But Cheng has since been unemployed.

*Medical expert opinion*

1. Cheng was examined by orthopaedic expert, Dr Lau Hoi Kuen, on 4 January 2007. Dr Lau’s report was dated 6 January 2007.
2. Dr Lau opined that degenerative lumbar spine was commonly found in middle-aged manual workers like Cheng. In Cheng’s case, the accident in 1998 was the precipitating factor for the onset of pain from the degenerative condition.
3. Dr Lau believed that the findings in the MRI of the lumbosacral spine of Cheng in 1999 and in 2005 were quite similar. He opined that the present accident *probably* caused aggravation of the pre-existing pain.
4. Despite Cheng’s projection of severe pain, Dr Lau opined that the condition of his low back had already improved by the time when he examined Cheng. Cheng was observed to have multiple positive Waddell’s inorganic signs, suggesting an element of exaggeration in his symptoms and signs.
5. In Dr Lau’s opinion, the sick leave granted was reasonable. Cheng had reached the stage of maximal medical improvement. He might need to take analgesic at times and to pay attention to back care.
6. With the multiple disc degenerative problems in his low back, Cheng was advised to avoid heavy manual lifting. Therefore he should not resume his pre-accident construction site job. He should take up lighter duties such as messengers, cleansing work, security guard and warehouse attendant, etc.
7. Dr Lau assessed that the low back condition caused Cheng 10% permanent impairment of the whole person. The 1998 accident and the present accident were believed to be equally, i.e., 50% each, responsible for the impairment.
8. One year later, on 24 January 2008, Cheng was examined by the expert engaged on behalf of KKT and FY, Dr David H F Cheng. Dr Cheng produced his report on 3 April 2008.
9. Considering the records of the governmental hospital, Dr Cheng believed that Cheng probably suffered from a simple back contusion of relatively mild nature.
10. Dr Cheng gave a similar explanation of the nature of the degeneration of the lumbar spine as that by Dr Lau. This was pre-existing. Dr Cheng detected no positive and objective findings in support of Cheng’s complaint. Like Dr Lau, Dr Cheng noticed positive Waddell’s signs which were highly suggestive of symptoms exaggeration. He shared the same view of Dr Lau that Cheng had reached maximal medical improvement.
11. In Dr Cheng’s opinion, it was possible that Cheng might have some pain. However at the time of the present accident, Cheng had impairment of his back due to the previous injury, for which Cheng was still attending orthopaedic clinic periodically. Dr Cheng found that Cheng was to a certain extent symptomatic by the time of the present accident. Clearly the present accident did not add any impairment. Dr Cheng agreed with the medical assessment board that in respect of the injury from the present accident, there was no loss of earning capacity.
12. As the effect of the present accident on Cheng should be mild, and in the absence of added impairment, Dr Cheng believed he could return to his pre-accident job. No change of job on orthopaedic ground would be necessary. His social and other activities would unlikely be affected significantly.
13. Dr Cheng considered that sick leave until mid-May 2006 was *slightly* on the high side. Sick leave up to January 2006 would have been reasonable.

*Discussion*

1. In summary, the 1998 accident already triggered the onset of pain from Cheng’s degenerative condition. Cheng was symptomatic at the time of the accident. The X-ray and MRI revealed no material deterioration of Cheng’s lumbosacral spine as a result of the present accident. Nevertheless, Dr Lau came to the view that the present accident had *probably* aggravated the pre-existing pain. Mr Lim’s scepticism about the basis for such opinion of Dr Lau is in my view understandable.
2. Mr Wong for Cheng offered an explanation for the view that the present accident did aggravate the pre-existing condition of Cheng. He referred to the fact that since June 2000, Cheng had continued to work at construction sites in his full capacity. There was said to be no problem at all for Cheng to do so until the present accident.
3. This proves to be not wholly true. As mentioned above, the medical report of the hospital recorded that Cheng was already advised to avoid heavy labour upon suffering from 10% loss of earning capacity as a result of the 1998 accident. Cheng did resume working in construction sites. But according to Leung who was responsible for hiring Cheng on behalf of KKT, there was an understanding between Cheng and Leung that Cheng would not be assigned to climb scaffolding or to work at height precisely because of the concern about his condition and ability since the 1998 accident.
4. Both experts found objective signs of exaggeration of symptoms. I think this is reinforced by the surveillance on Cheng in early 2008. Viewing the video recording, I do not find Cheng had any apparent difficulty in coping with his daily activities, despite certain body gesture suggesting occasional discomfort pointed out by Mr Wong.

*Pain suffering and loss of amenities (PSLA)*

1. Cheng was 49 years old at the time of the accident. He is now 52.
2. Cheng claims his PSLA should attract an award in the region of HK$130,000. Accepting a 50% reduction on account of his pre-existing condition, he claims a sum of HK$65,000.
3. Mr Wong for Cheng referred to these cases as comparables: *Mandeep Singh v Southwell Construction Co Ltd & Anor*, HCPI 575/2005 (22/9/2006); *Ng Kong v Golden Caterers Ltd*, HCPI 206/2004 (3/2/2005); *Limbu Netra Kumar v Yau Lee Construction Co Ltd & Anor*, HCPI 234/2002 (25/4/2007).
4. Mr Lim for KKT and FY submitted that the mild injury to Cheng in the present accident did not add to any impairment that Cheng has. He referred to *Ahmed Masood v Chung Kau Engineering Co Ltd*, DCPI 1517/2003 (28/1/2005); *Tam Yuen Hoi v 陳牧成 & Ors*, HCPI 983/2001; *Tam Fu Yip Fip v Sincere Engineering & trading Company Limited*, HCPI 473/2006 (6/6/2007) and suggested an award of HK$30,000.
5. Reference was also made to the principle on assessment of damages in the case of pre-existing injuries in *Chan Kam Hoi v Dragages Et Travaux Publics* [1998] 4 HKC 523.
6. Considering the circumstances of Cheng and the above discussion, I am of the view that a sum of HK$50,000 should be a fair award under this head of claim for the PSLA resulted from the present accident.

*Loss of earnings and earning capacity*

1. During trial, it was agreed that the pre-accident monthly income of Cheng was HK$11,600.
2. Despite Dr Cheng’s comment that the sick leave granted was slightly on the high side and recommended a few months less, I am prepared to accept that Cheng was entitled to take such leave and has therefore suffered total loss of income during that period. Inclusive of the MPF benefits, the amount was HK$11,600 x 14.6 months x 1.05 = HK$177,828.
3. In view of the above discussion, I am not satisfied that the present accident has caused Cheng any material loss of earning capacity that he would not have already suffered in the absence of the present accident. I agree with Mr Lim’s submission that no further award should be made for Cheng’s loss of earnings or earning capacity.

*Miscellaneous special damages*

1. Medical expenses in the sum of HK$7,960 and travelling expenses in the sum of HK$1,744 are agreed.
2. A sum of HK$4,300 is claimed for tonic food. Mr Lim submitted that not more than HK$1,000 should be allowed, in the absence of medical evidence in support of such expenses. I am prepared to allow HK$2,000.
3. The total amount allowed under this head of claim would have been HK$11,704.

*Summary*

1. Damages would have been as follows:

PSLA HK$ 50,000

Loss of earnings (with MPF) HK$177,828

Miscellaneous special damages HK$ 11,704

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Total: HK$239,532

1. Interest would have run at 2% per annum on general damages from the date of writ to today and at half judgment rate on special damages from the date of accident to today.
2. Credit would have had to be given to the employees’ compensation in the sum of HK$175,808.08.

**Order**

1. The claim is dismissed with costs, including any costs reserved, to KKT and FY. Costs shall be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Cheng’s own costs be taxed in accordance with legal aid regulations. In the absence of application in 14 days to argue costs, the nisi order shall become absolute.

Simon Leung

District Judge

Mr Joeson WONG instructed by Messrs K C Ho & Fong on the assignment of the Director of Legal Aid for the Plaintiff

Mr Patrick LIM instructed by Messrs Leung & Lau for the 1st and the 2nd Defendants