DCPI No. 226/2008

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 226 OF 2008

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BETWEEN

CHUNG WING YUEN Plaintiff

and

HONG KONG AIR CARGO

TERMINALS LIMITED Defendant

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

Coram: HH Judge Lok in Court

Dates of trial: 13 & 14 October, 7 & 12 November 2008

Date of handing down of Judgment: 10 March 2009

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JUDGMENT

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1. This is a claim for damages for personal injuries arising out of an alleged accident at work.
2. On 9 December 2005, the Plaintiff was employed by the Defendant as an airfreight handler or logistic attendant to work at the Air Cargo Terminal of the Hong Kong International Airport. It is the Plaintiff’s case that at about 5:00 am, he was instructed by his superior to operate a grip tow (“the Grip Tow”) to tow an empty trailer back to a cargo terminal building. At that particular time, there were 2 empty trailers parked on top of some ditch covers which were just outside the cargo terminal building. When he operated the Grip Tow on the uneven surface near the ditch covers, the handlebar of the Grip Tow shook and swung violently throwing the Plaintiff’s right arm to the back. When the Plaintiff then tried to pull his right hand forward in a bid to regain control of the handlebar, the handlebar bounced back and struck the Plaintiff’s right hand. As a result, the Plaintiff claims that he had suffered injuries to his right hand and right shoulder. According to the Plaintiff’s case, such accident was caused by the breach of the implied terms of the contract of employment, negligence and breach of statutory duties on the part of the Defendant.

*Evidence at the trial*

*(i) The Plaintiff’s factual evidence*

1. The Plaintiff himself testifies at the trial. According to him, he was working for the Defendant under a contract of employment for 2 years commencing on 18 June 2004, and his duties included the handling of air cargo and issuing the relevant cargo documentations. Occasionally, the Plaintiff had to operate forklift trucks and grip tows in the Air Cargo Terminal area. On 28 and 29 April 2005, the Plaintiff attended a training session on the operation of grip tow, and he obtained the licence to operate such kind of machine in November 2005. During the training, he was told not to operate a grip tow on uneven surface. Although he did not have the specific opportunity of trying to operate a grip tow near the area with the ditch covers on that particular occasion, he had received some training to operate such kind of machine on uneven surface on the second day of the training session.
2. On the day of the alleged accident, he was instructed by his superior, Mr. Man Ting Fai, to operate the Grip Tow to retrieve an empty trailer to a cargo terminal building known as the “EI Building”. At that time, there were 2 empty trailers parked on top of some ditch covers which were in the area between the EI Building and another main cargo terminal building. The Plaintiff had to manoeuvre the Grip Tow in front of the trailer so that he could attach the towing-hook of the trailer to the back of the Grip Tow. Just at that particular moment, the handlebar of the Grip Tow shook and swung violently to the left and the force of the “steer pull” caused his right arm to be thrown backwards. His left hand also lost control of the handlebar and was thrown downwards to the area near the panel of the battery box of the Grip Tow. After his left hand grabbed hold of the panel for support, the Plaintiff pulled his right arm forward in a bid to regain control of the handlebar. However, his inner right forearm and wrist were then struck by the handlebar which swung violently back from the left to the right in the course of the “steer pull”. Hence, the Plaintiff had suffered injuries both in the hand and the shoulder.
3. After the accident, the Plaintiff discovered that the concrete surface parallel to the edge of the drain covers was about 1 inch lower than the drain covers, which is shown in the photographs at page 170 of the trial bundle. According to the Plaintiff’s previous experience, there would be some vibration and bouncing in the handlebar when the grip tow was driven pass the surface with ditch covers. Hence, the Plaintiff says that it was such uneven surface which caused the “steer pull” in the handlebar of the Grip Tow. The Plaintiff also found out later that the front wheel of the Grip Tow was abraded and worn out.
4. The Grip Tow was designed to operate under a very slow speed. There were 1 steering wheel in the front and 2 wheels in the back. There was an accelerator foot pedal, and when pressed, the Grip Tow would accelerate slowly. When the pedal was not stepped down, the Grip Tow would gradually slow down. According to the Plaintiff, it was the uneven surface at that area which caused the “steer pull” in the front wheel of the Grip Tow. In the past, he had operated grip tows outside the air cargo terminal buildings near the ditch covers area about 10 times.
5. After the accident, the Plaintiff made a report to his supervisor. By that time, the pain was not serious and so he did not seek medical treatment on the same day. On the next day, the pain worsened and the Plaintiff then sought medical treatment from Yan Chai Hospital. After the accident, there was pain in the right forearm area. About a month later in January 2006, there was also pain in the right shoulder. Despite the treatments, the pain and stiffness in the right shoulder remained. By reason of his injuries, the Plaintiff could only obtain some part-time jobs after the accident.

*(ii) The Defendant’s factual evidence*

1. The Defendant has 1 factual witness who is one of its existing employees Mr. Chow Mei Lun. By reason of his duties, Mr. Chow frequently had to operate grip tows in the Airport Cargo Terminal area in the period from 2004 to 2006, and so he had considerable experience in the operation of such machine. As the *locus* of the alleged accident was in the passageway between the 2 main air cargo terminal buildings, Mr. Chow had to operate grip tows in that area frequently. By reason of his experience, he can say that there might be some minor vibration in the handlebar when a grip tow was driven pass the area with ditch covers. However as the grip tow was designed to operate at a very slow speed, the handlebar could have not swung or vibrated that violently as described by the Plaintiff. He had not experienced “steer pull” before, nor had he heard about similar complaint by other workers. Mr. Chow had encountered no problem or difficulty operating a grip tow in the area with ditch covers, and he confirms that it was not dangerous to operate a grip tow under such kind of condition.
2. Mr. Chow does not notice whether was 1 or 2 wheels in the front part of a grip tow. However, he confirms that the steering for the grip tow was powered driven, and so it did not require a lot of strength to steer and operate a grip tow. In general, a grip tow would travel very slowly at about 6 to 8 km per hour. If the operator lost grip of the handlebar, the grip tow would stop even if the operator was still stepping on the accelerator foot pedal of the machine.

*(iii) The medical expert evidence*

1. There are 2 medical experts giving evidence in the present case, namely Dr. Peter Tio and Dr. Henry Ho engaged by the Plaintiff and the Defendant respectively.
2. There is no dispute between the 2 experts about the medical history of the Plaintiff. The Plaintiff had a previous accident and suffered a right shoulder dislocation when he slipped and fell down a slope on 22 April 1995. He was then diagnosed to have suffered from traumatic arthritis of the right shoulder and shoulder impingement. He underwent 2 operations after the accident. Although he was then assessed by the Medical Assessment Board to have suffered 4% loss of earning capacity, the Plaintiff maintained that his right shoulder was symptom free after the previous accident and the operations.
3. The subject accident was therefore the second industrial accident of the Plaintiff. Shortly after the present accident, the Plaintiff complained of pain in the right hand and the right wrist but there was no pain in the right shoulder. The pain became more serious and he then sought treatment from Yan Chai Hospital on 11 December 2005. He later attended the Princess Margaret Hospital for further treatments. According to the medical report, there were: (i) pain over the ulnar aspect of the right forearm; and (ii) minimal local swelling. There was no external wound or fracture of bone. The Plaintiff started to complain of pain in the right shoulder about a month later in January or February 2006. The Plaintiff later attended a series of physiotherapy treatments.
4. In respect of the present alleged accident, the Plaintiff was initially assessed by the Medical Assessment Board to have suffered 4% loss of earning capacity after taking into account the loss of earning capacity caused by the earlier accident in 1995. Upon review, the percentage was revised downwards to 0.25%.
5. According to the 2 medical experts, the Plaintiff’s main complaints are about the pain and the stiffness in the right shoulder. By reason of such disabilities, the Plaintiff claims that he cannot lift heavy objects and has difficulty wringing a towel.
6. According to the Plaintiff’s expert, Dr. Tio, the Plaintiff’s current complaint is compatible with the mechanism of injury caused by the alleged accident. There are sign and symptom suggesting superficial radial nerve injury with resultant hyperaesthesia in his right first web space, and this kind of discomfort can cause impairment to the extent as that described by the Plaintiff. As to why the Plaintiff only complained of shoulder pain about a month after the accident, Dr. Tio explains that it was possible that the Plaintiff had minor sprain to his right shoulder at that time which was not as symptomatic as his right wrist. Further, the right wrist pain resulting from the alleged accident could possibly have caused more exertion over his right shoulder during his daily activities and the shoulder pain might then become more apparent in January 2006.
7. When being questioned at the trial, Dr. Tio agrees that, as there was some wasting of muscle in the right upper arm, there might be some reduction in the movement of the right shoulder after the 2 operations in 1995. For the present accident, the MRI scan shows that the Plaintiff only sustained soft tissue injury. Dr. Tio agrees that for soft tissue injury, most of the patients would be able to have full recovery without any permanent disabilities.
8. On the other hand, the Defendant’s expert, Dr. Henry Ho, is of the view that, if there was an accident of some sort, the Plaintiff had only sustained a minor contusion injury to the radial aspect of the right forearm around the superficial branch of the radial nerve, which explains why the Plaintiff had suffered pain radiating down to the first web space. Such kind of injury was very minor and the Plaintiff should have had full recovery about 1 week after the accident. Relating to the shoulder injury, Dr. Ho is of the opinion that the Plaintiff’s complaint is not genuine, and he supports such conclusion with the following reasons.
9. Firstly, according to Dr. Ho, if the Plaintiff had suffered injury with the right arm thrown backwards violently as described by the Plaintiff, this would have been an acute injury. For such kind of injury, the Plaintiff should have experienced pain in the shoulder shortly after the accident, not nearly a month later.
10. Secondly, such kind of violent twisting of the arm should have caused some kind of rotator cuff tear or effusion in the shoulder, and for such kind of injury, there should have been some fluid in the shoulder joint suggesting inflammation. Yet the MRI scan, which is a sensitive test, does not show any of such injury. The scan conducted in the Princess Margaret Hospital only shows an area of supraspinatus tendinosis, which is a degenerative phenomenon of the tendon tissue common in individuals even without shoulder pain.
11. Thirdly, according to the medical report of the Princess Margaret Hospital, the Plaintiff complained of pain in the ulna (outer) aspect of the mid right forearm after the accident. This, according to Dr. Ho, is inconsistent with the Plaintiff’s version that he was hit on the radial (inner) aspect of the right wrist or forearm.
12. Fourthly, the Plaintiff complains that his right hand has fatigue quite easily, and the hand is unsteady when he is writing and holding chopsticks. However, there is no significant sign of muscle wasting in his right forearm to suggest such a significant disability. In fact, the medical findings show the opposite. The circumference of the Plaintiff’s right forearm is bigger than that of the left forearm, and Dr. Ho cannot offer any sensible explanation for such difference. There is some wasting of muscle in the right upper arm, but that was probably caused by the Plaintiff’s previous accident and the inadequate rehabilitation after the shoulder operations. In fact, such kind of operations usually require long rehabilitation programme, but the Plaintiff claims that he had not attended any follow up treatment after the operations in 1995. The lack of proper rehabilitation was, therefore, probably the cause of the muscle wasting in the right upper arm. In any event, the muscle wasting in the upper arm would not have caused the complaints about the use of the hand as mentioned by the Plaintiff above.
13. Fifthly, the behaviour of the Plaintiff at the time of the joint medical examination also casts serious doubt on the genuineness of the Plaintiff’s complaint. When the Plaintiff was asked to remove his long-sleeve top during the medical examination, the Plaintiff was able to take his right arm out first. According to Dr. Ho, this is inconsistent with the Plaintiff’s complaint about his shoulder pain. If someone is suffering from genuine and significant right shoulder pain, he should take the good arm (left arm) out first, pull the top over the head and then use the good arm to remove the top around the painful arm (right arm). However, the Plaintiff did the opposite. Further, the result of the impingement test was negative. Such test is conducted by pulling up the arm of the patient. If the patient suffers genuine pain, he should voice out the pain when his arm is pulled up, and yet the result was negative in the present case.
14. Even if the Plaintiff’s wrist was struck by the handlebar during the alleged accident, the injury to the sensory nerve in the wrist or forearm, says Dr. Ho, would not have caused the pain in the shoulder because the pain would not pass from the nerve in the hand to the nerve in the shoulder area. Nor could such injury affect the function of the muscles in the shoulder area. All these findings, therefore, do not support that the Plaintiff’s complaint is a genuine one.

*Assessment of the evidence*

1. In my judgment, the Plaintiff has failed, on the balance of probabilities, to discharge the burden of proving that there was an accident which happened in the way as described by him. My reasons are three-fold.
2. Firstly, I have serious doubt as to whether there could have been such violent shaking and vibration of the handlebar when the Plaintiff was operating the Grip Tow very slowly at the time of the accident. At that particular time, the Plaintiff was manoeuvring the Grip Tow in the front of the trailer so that he could attach the towing-hook of the trailer to the back of the Grip Tow. Obviously, he had to operate the Grip Tow very slowly so that he could stop the Grip Tow in the correct position in front of the trailer. Further, as shown in the photographs exhibited in page 170 of the trial bundle, the area near the ditch covers did not have a very uneven surface. In such circumstances, I have grave doubt as to whether such kind of surface could have caused the steering handlebar of such heavy grip tow to bounce that violently, to the extent that it caused the Plaintiff’s right arm to be thrown to the back.
3. In fact, when the Plaintiff lost grip of the handlebar when the same was swinging to the left, the Grip Tow, according to the evidence of Mr. Chow, should have stopped or slowed down. In such case, where was the momentum which caused the violent twisting or swinging of the handlebar from the left back to the right? To me, this is certainly a doubt in the Plaintiff’s case.
4. According to the Plaintiff’s evidence, the wheel of the Grip Tow was abraded at the time of the accident and that was one of the reasons causing the violent vibration in the handlebar. Despite such allegation, it is still uncertain as to how the handlebar could have vibrated that violently as the Grip Tow was travelling very slowly by that time. Further, I have no idea about the extent of the worn-out of the wheel, and how such worn-out would have affected the operation of the Grip Tow. I also have serious doubt as to whether the wheel was in fact abraded at the relevant time. If there was indeed such defect, the Plaintiff should have reported the matter to his superior immediately, or at least he should have discussed the issue with his co-workers such as Mr. Chow, and yet there is no mentioning of such complaint in any of the evidence in the present case.
5. It is certainly regrettable that there is no expert evidence about the operation of the grip tow to support the Plaintiff’s case. At the very least, the Plaintiff should have arranged a demonstration at the *locus* of the accident, so that the court can understand how the slightly uneven surface near the ditch covers would affect the operation of a heavy grip tow. Certainly, grip tow is a unique kind of machinery, and it is very difficult for the court to know, without the benefit of expert evidence or a demonstration, how a grip tow would behave when passing a surface with ditch covers. The Plaintiff’s evidence has not assisted the court in understanding the cause of the alleged accident, and in my judgment, there remains a lurking doubt in the Plaintiff’s case.
6. Secondly, the factual evidence given by the Plaintiff’s colleague, Mr. Chow Mei Lun, also does not support the Plaintiff’s contention. In considering Mr. Chow’s evidence, I have already taken into account the fact that he is still an employee of the Defendant. However, being a co-worker of the Plaintiff in the past and having assisted the Plaintiff to take the photographs of the *locus* of the accident, Mr. Chow apparently does not have any grudges against the Plaintiff. Further, Mr. Chow’s evidence is direct and straight to the point, and I do not accept that Mr. Chow is prepared to tell a pack of lies to the court simply to protect his employment.
7. Obviously, Mr. Chow was an experienced grip tow operator. As the *locus* of the alleged accident was in the passageway between 2 main cargo buildings, it was quite common for grips tows to pass through the area with the ditch covers. Yet with all his experience, Mr. Chow had not encountered any difficulty in operating a grip tow in that area. Although there might be some slight bouncing in the handlebar when a grip tow was driven on top of a ditch cover, the problem was quite negligible and the handlebar could not have shaken that violently as described by the Plaintiff. Taking into account his experience and the number of times that he had operated a grip tow in that area, there is no reason for the court to doubt his evidence in this regard. Further, as it was so common for grip tows to pass through that area, there should have been a lot of reported incidents or complaints if there was serious vibration in the handlebar when a grip tow was driven across the surface with the ditch covers, and yet there was none in present case. Hence, having considered the oral testimony of Mr. Chow, I do not accept the Plaintiff’s evidence that the handlebar of the Grip Tow could have shaken that violently at the time of the alleged accident.
8. Ms. Sujanani, counsel for the Plaintiff, submits that the accident was caused by the negligence of the Defendant. The operation guide for the grip tow had expressly provided that such machine should not be operated on uneven surface. As the area near the ditch covers was uneven, it created an obvious danger for the operation of a grip tow. In such circumstances, the Defendant should not have allowed the Plaintiff to operate the Grip Tow at that particular location or have allowed other workers to park the trailers on top of the ditch covers. Further, anyone taking the examination to obtain the driving licence for grip tow would fail after making 5 or more errors. As the Plaintiff made 4 errors in the examination, which was close to the passing mark, the Defendant should not have allowed the Plaintiff to obtain the licence. Ms. Sujanani also submits that, by reason of the long lapse of time between the training session and the granting of the licence, the Defendant should have provided refresher course to the Plaintiff regarding the operation of grip tow.
9. These submissions are made on the basis that the area on top of or near the ditch covers was an obvious danger for the operation of a grip tow. However, taking into account the condition of the surface as shown in the photographs included in page 170 of the trial bundle, the design and the operation of the grip tows, the absence of supporting expert evidence and the oral testimony of Mr. Chow, I simply cannot accept that the area on top of or near the ditch covers was unsafe. Further, some of Ms. Sujanani’s arguments were only first raised in the final submissions, for example the submissions relating to the refresher course and the examination for the licence of the grip tow, and I doubt very much whether the Plaintiff should be allowed to rely on these arguments at such a late stage. Hence, whatever way one is to look at the Plaintiff’s claim, it cannot possibly succeed.
10. Thirdly, the medical expert evidence also casts serious doubt on the genuineness of the Plaintiff’s complaint. Having carefully considered the expert evidence of the 2 medical practitioners, I certainly prefer to accept the opinion of Dr. Ho. Firstly, Dr. Ho is able to back up his opinion with a list of solid reasons as mentioned above. Secondly, the objective medical tests, such as the MRI scan, do not support that the Plaintiff has suffered any serious injury in the shoulder as described by him. Thirdly, even the Plaintiff’s expert, Dr. Tio, agrees that the Plaintiff has only suffered soft tissue injury as a result of the alleged accident, and in most cases, patients suffering such kind of minor injury would be able to have full recovery after the accident. As Dr. Ho is of the view that the Plaintiff’s complaint regarding his injury is not genuine, it also casts serious doubt on the truthfulness of the Plaintiff’s version of events regarding the occurrence of the alleged accident.
11. In her submission, Ms. Sujanani argues that Dr. Ho is somewhat biased against the Plaintiff. I do not agree. Dr. Ho is always able to support his findings with objective test results and observations, and being a qualified expert with no direct interest in the outcome of the case, I cannot think of any reason why Dr. Ho has to be biased or hostile towards the Plaintiff.

*Conclusion*

1. Based on the aforesaid reasons, the Plaintiff has failed to prove there was an accident occurring in the way as described by him, and so he is not able to establish any contractual or tortious liability on the part of the Defendant. I therefore dismiss the Plaintiff’s claim. I also make an order *nisi* that the costs of the action be to the Defendant with certificate for counsel, which shall be made absolute 14 days after the date of the handing down of this judgment.
2. Usually, I will deal with the issue of quantum in the case that this case goes elsewhere and a contrary view is taken about the liability issue. However, since I accept the expert evidence of the Defendant, even if the Plaintiff’s right hand was struck by the handlebar, the Plaintiff should have had full recovery about 1 week after the accident. In such case, the quantum of the Plaintiff’s claim would be minimal. Hence, there is no point for me to explore further the issue of quantum in this case.
3. Finally, I would like to express my gratitude to both counsel for all the assistance that they have rendered to this court.

(David Lok)

District Judge

Ms. Bina Sujanani, instructed by Messrs. K. Y. Lo & Co., for the Plaintiff

Mr. Victor Gidwani, instructed by Messrs. Deacons, for the Defendant