# DCPI 25/ 2005

## IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 25 OF 2005

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# BETWEEN

## YIM KWOK YUEN Plaintiff

## 

## KEENTECH TRANSPORTATION LIMITED

## (in liquidation) 1st Defendant

TSANG KAM HUNG trading as CHEUNG LEE

###### TRANSPORTATION COMPANY 2nd Defendant

#### NATIONAL INSURANCE COMPANY LIMITED 3rd Defendant

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JUDGMENT

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##### Coram : Deputy District Judge E. Yip in Court

###### Date of Hearing : 14-16 November 2005 and 19-20 December 2005

###### Date of Judgment : 11 January 2006

The plaintiff’s case

1. The plaintiff was a container truck driver. He drove EP 9717 *(“the Truck”)* owned by the 1st and/or the 2nd defendants. He was employed by the 1st and/or the 2nd defendants. He fell from the truck in the course of work. The 2nd defendant was the owner of the Truck. He says it happened as a result of negligence, breach of the contract of employment, breach of duty of care as an occupier or at all, on the part of the 1st and/ or the 2nd defendants. He claims general and special damages.

*The 1st defendant’s case*

2. The 1st defendant was in liquidation. It did not file any Notice of Intention to Defend. The plaintiff obtained default judgment. The Court ordered for damages to be assessed and costs to be taxed.

*The 2nd defendant’s case*

3. The 2nd defendant disputed that it was the owner or occupier of the truck, or the plaintiff’s employer. In any event, the accident was caused by the plaintiff’s own negligence.

*The 3rd defendant’s case*

4. The 3rd defendant had been the insurer of both the 1st and the 2nd defendants. On 13 January 2004, Master Allan Leung granted it leave to defend the proceedings including the issue of liability and quantum of compensation on its own behalf. The 3rd defendant agreed to indemnify the 1st defendant but not the 2nd defendant as the 2nd defendant was in breach of the insurance agreement. The 3rd defendant now seeks to serve a notice claiming contribution and indemnity on the 2nd defendant in case the 1st defendant is made liable. The 2nd defendant does not object to this. Be that as it may, I do not see what locus the 3rd defendant has to put in this notice for and on behalf of the 1st defendant. I refuse the application.

5. The 3rd defendant applies to set aside the default judgment against the 1st defendant. The 3rd defendant also takes out a summons to amend the 1st defendant’s Defence. The 2nd defendant’s counsel submits that the 3rd defendant has no locus to do either things. I agree. Be that as it may, I also agree with the 3rd defendant’s counsel *[para. 6 of 17 December 2005 Submissions]* incidentally that the default judgment against the 1st defendant was only a procedural award, which does not preclude the 3rd defendant from arguing on liability on merits. A procedural award does not constitute *res judicata* in a subsequent hearing on merits *(Chu Hung Ching v Chan Kam Ming & Ors., [2001] H.K.C. 396 C.A. citing in approval Pocklington Foods Inc. v Alberta Provincial Treasurer (1995) 123 D.L.R. (4th ) 141 )*.

6. The 3rd defendant leads evidence. It had engaged a loss adjuster to investigate into the case. It had unveiled materials discrediting the plaintiff and the 2nd defendant. The accident was caused by the plaintiff’s own negligence. Besides, the 2nd defendant was responsible for being negligent, the sole employer and the sole occupier of the truck.

The crux of the case

7. In the morning on 13 October 2000, the plaintiff was injured when he was boarding the Truck for work. He was taken to hospital for treatment. He received sick leave and was out of work for some time. He had received from the 1st and/or the 2nd defendant the total sum of $159,875.20 before trial. All parties agree that if full liability is established, the quantum should be assessed at $250,000 (inclusive of interest). The final award will be subject to a reduction, if any, due to contributory negligence.

*Issues for trial*

8. This Court has to determine:

1. Whether the plaintiff met with an accident resulting in his injuries;
2. Whether the 1st defendant was the plaintiff’s employer;
3. Whether the 2nd defendant was the plaintiff’s employer;
4. Whether the 1st defendant was the occupier of the Truck;
5. Whether the 2nd defendant was the occupier of the Truck;
6. Whether the 1st defendant was in breach of any duties as employer or occupier or at all;
7. Whether the 2nd defendant was in breach of any duties as employer or occupier;
8. Whether the plaintiff had contributory negligence;
9. Assessment of damages to be borne by any responsible parties.

*Evidence in the plaintiff’s case*

9. The plaintiff gives evidence. He was a truck driver for about 20 years up to 2000. In late August 2000, he was introduced to Mr. Tsang Kam Hung (“Tsang”) of the 2nd defendant. Tsang offered to employ him as a driver of a container truck belonging to the former. Tsang promised him good pay and fringe benefits. He resigned from Hoi Sing Transportation Company and commenced to work for Mr. Tsang on 31 August 2000. A few days afterwards and onwards, he was assigned to drive the Truck. Mr. Tsang let him drive it home and park it where he pleased. The Truck had missing handrails on each side and a slippery and loose 3-step ladder leading to the driver’s cabin. He had complained about such a dangerous state to Tsang whenever they met about once every week, but no repairs were done.

10. At 6.30 a.m. of 13 October 2000, he left home to board the truck for work. It had been parked nearby his home, on Yau Oi Road. It was parked parallel to, and its offside at 1 –2 feet, from the curb. He opened the driver’s door and mounted the ladder. He had to grab the steering wheel (on his right-hand-side) and the driver’s seat (on his left-hand-side) for support due to the lack of handrails. As he was standing on the highest step, at about 5 feet from the ground, and about to enter the driver’s cabin, he slipped off the step and fell back. His right lower back hit on the metal railings behind him. He felt great pain and dizzy. He eventually gathered strength and mounted the driver’s seat to rest. After half an hour, he rang up his wife. His wife came down to see him. Ambulance was summoned to take him to the hospital. He was given sick leave from that date to 28 February 2001 and 1 more day on 12 March 2001.

11. His main injuries were the fracture of 2 lower ribs and of transverse process of the vertebrae on his right side. He had some bleeding in the liver and pleural effusion which were not very serious.

12. After the accident, he could not do the job and had to resign. After some periods of unemployment, he drove trucks with a lighter workload full-time and later a franchised mini-bus on relief duty. He could not earn as much as before the accident.

13. After the accident, Tsang had given him cheques as wages and compensation. Tsang also introduced a stranger, Mr. Law Ping Ming (“Law”) to him. Tsang told him that Law was his real employer and that Law’s policy could give him more compensation. Tsang was only willing to give him the cheques upon his signing a document acknowledging Law’s employment. He had no idea of the exact relationship between Tsang and Law. His utmost concern was to get the cheques for his living. He could not afford to argue about who issued them.

*Evidence in the 1st defendant’s case*

14. The 1st defendant is absent and unrepresented.

*Evidence in the 2nd defendant’s case*

15. Tsang gives evidence. The 2nd defendant calls no other witnesses. I shall only set out the 2nd defendant’s case where it contradicts or goes beyond the plaintiff’s case.

16. At the job interview on 25 August 2000, the 2nd defendant had told the plaintiff that it was the 1st defendant who employed him. He replied that understood and agreed to it.

17. On the same date, the 2nd defendant entered into an agreement for its sale and the 1st defendant’s purchase of the Truck (“the Agreement”). There was to be a 2-month trial period from 1 September 2000. The 2nd defendant kept no keys after handing one key to the 1st defendant and the other one to him. The 1st defendant gave orders to the 2nd defendant, who instructed him to work. He had to fill out forms for a work-done schedule to submit to the 2nd defendant, who forwarded the same to the 1st defendant for payment. Afterwards he resigned and the 1st defendant did not proceed with the purchase. Then the 2nd defendant sold the Truck to a car company. He had told the plaintiff of the terms of the Agreement, including the dismissal of the plaintiff if the 1st defendant did not proceed with the purchase.

18. At all material times, including the date of the accident, there were 3 secure handrails in total on both sides of the driver’s door, with a secure ladder. These were the original parts of the Truck *ex* manufacturer’s factory. There was a paint spray job done by the garage after the accident, as shown in photos *[BC 94]*. It had nothing to do with the handrails or the ladder. He cannot recall the date.

*Evidence in the 3rd defendant’s case*

19. Mr. Lam Wing Fung *(“Lam”)* gives evidence. He worked for Toplis and Harding (Hong Kong) Limited, a loss adjuster appointed by the 3rd defendant. He was instructed to investigate into the plaintiff’s claim. He spotted the plaintiff working full time on 13, 15 September 2004. He made an investigation report *[BD 325-332]* and a surveillance tape in September 2004. He took statements from the plaintiff and the 2nd defendant.

*This Court’s findings*

*On the plaintiff’s evidence*

20. Mr. Yip, counsel for the 2nd defendant, submits *[in paras. 18-23 of Submissions]* that the plaintiff stated *[in examination-in-chief]* that it was shortly after 6 a.m. when he came to board the Truck for work. He fell and rested for half an hour. He stated *[in para. 11 of his witness statement, at C 17]* that he phoned his wife immediately. He stated *[in Answer 16(a), (b) to the Interrogatories, at A 58]* that after arrival at the scene, she called the ambulance. The ambulance arrived 5 – 10 minutes later. Counsel points out that the ambulance arrived at 9.23 a.m. *[according to Fire Services Department’s letter, at D 130]*. I see no reason how it was already 9.23 a.m., when the ambulance arrived. I do not find the plaintiff’s evidence credible.

21. Counsel submits *[in paras. 24-26 of Submissions]* that the plaintiff stated *[in Answer (1)(b)(i) to Request to F & B, at A41]* that the Truck was parked on Oi Ming Lane. However, he says *[in cross-examination]* that it was parked on Yau Oi Road. I note his mention *[in Answer 10 to Interrogatories, at A 54]* and his oral evidence *[in cross-examination]* that it was Yau Oi Road. He explains that *[in cross-examination]* that he could not remember this well because it was long time ago. He says he can clearly remember it in Court. I see no reason how his memory is getting better as time goes by. I do not believe that he would fail to recall the location where he fell.

22. Counsel submits *[in paras. 33-34 of Submissions]* that he has shifted the marked position of the Truck *[on the photo Exh. P2 in cross-examination]* to a few feet away where there was a metal railing *[on the photo Exh. P3 in re-examination]*. His markings [from Exh. P2 to Exh. P3] demonstrate a plain attempt to make up evidence as the case develops. I agree.

23. Counsel refers *[in para. 45-47 of Submissions]* to the plaintiff’s mention *[in para. 31 of his witness statement, dated 27 April 2004, at C 26]* that he had not got a job up to the date of the witness statement. After his solicitors told him of Lam’s Investigation Report *[of surveillance on 13 and 15 September 2004*, *at D 325-335]*, he admitted *[in para. 3 of his witness statement, dated 25 February 2005, at C 50]* that he started to work as a minibus driver since September 2004. According to the IRD record *[in D 318]* he earned $112,069.00 for the period of 1 April 2004 – 31 March 2005. I do not think that such his job at $10,000 per month could be omitted from mention [in his witness statement dated 27 April 2004, at C 26]. I do not find his evidence credible.

24. I do not find him a credible witness. I have serious doubts in the following:

1. Whether the accident happened there and in the way he describes;
2. Whether he was in the course of employment under the 1st and/or the 2nd defendant at that time;
3. Whether the Truck had missing handrails, a slippery and loose ladder;
4. Whether he had repeatedly complained to Tsang about the same.

*On Tsang’s evidence in the 2nd defendant’s case*

25. Mr. Chan, counsel for the plaintiff, submits *[in para. 8 of Submissions]* that Tsang first says *[in cross-examination]* that before the 1st defendant and he signed the Agreement on 25 August 2000, there had been no agreement between them (the 1st defendant and him). Counsel asks him why he had already recruited the plaintiff for the 1st defendant on 24 August 2000. He replies that there was already an oral agreement between them *(the 1st defendant and him)* before 25 August 2000. Counsel asks him to explain the contradiction. He replies that the Court is a solemn place and counsel asks him again and again, and he has no choice but to say Ye Ye Ye. I do not find his evidence credible.

26. Mr. Sadhwani, counsel for the 3rd defendant submits *[in para. 35 of Submissions]* that there was no reason for Tsang to handle the compensation cheques. After all, the 1st defendant had not proceeded with the purchase of the Truck. He replies that he had charged the 1st defendant $50 for arranging the transport of each container. He replies that it was his obligation to do so. When asked why he had not simply directed the plaintiff to go to the 1st defendant’s office in Kwai Chung to get the cheques. He replies that the plaintiff was not willing even to go to his place to get the cheques.

1. I notice his grumble *[in cross-examination]* that the 1st defendant charged him $500 reciprocally. I do not see any rationale for his kindness. First, there was no legal obligation because the charge for arranging transport for the 1st defendant had nothing to do with the task of the 1st defendant to compensate its own (the 1st defendant’s) employee. Second, there was no moral obligation, either, because the 1st defendant charged him 10 times ($50 : $500) reciprocally. Whether the plaintiff was unwilling to collect the cheques in the 1st defendant’s office in Kwai Chung was a matter entirely for the plaintiff and not of his concern. I do not find his evidence credible.
2. 28. Mr. Sadhwani refers *[in para. 36 of Submissions]* to Tsang’s evidence *[in evidence-in-chief]* that on 31 August 2000, he had told the plaintiff that the 1st defendant was the employer. However, he says [in cross-examination] that despite the plaintiff’s ineligibility due to old age he still told the plaintiff that the 1st defendant would arrange for MPF. He regarded it important to make it clear that the 1st defendant was the plaintiff’s employer. I do not find his evidence credible.

29. At length he has described how he excised his firm’s name from the top part of the work-done schedule and photocopied the resulting blank forms for the plaintiff. He gave the plaintiff only the revised blank forms to make sure that the plaintiff knew he was not the employer. Given his intense prudence in handling this relationship issue, I do not see why he had not put anything into writing. I do not find his evidence credible.

1. 30. Mr. Chan refers *[in para. 11 of Submissions]* to Tsang’s mention *[in his statement to Lam, dated 4 December 2001, at D 103]* that he could not remember whether he had told the plaintiff that the 1st defendant was the actual employer. He explains *[in cross-examination]* that Law *(of the 1st defendant)* just asked him to tea and to give a statement to someone from the insurance company. He did not know Lam of the insurance company. Lam assured him that it would only be a casual statement. In the restaurant, the television was noisy and people were talking and interrupting. He gave casual answers and signed the statement. I do not see how he could be so causal with the statement. It was obvious a matter of great importance to him. He could face serious financial consequences if the matter developed against his interest. I do not find his evidence credible.
2. 31. He is not satisfied *[in cross-examination]* with various parts of his statement *[Statement to Toplies, dated 4 December 2001, BD 97-99]*.He now marks them out with highlight pens. He says he had reasons to sign the statement, though. First, he could not read clearly as he had no reading glasses at that time. Second, the television was noisy and Law was barging in all the time. Third, he thought it was a causal statement. Fourth, he was asked to sign. However, he says subsequently that he still managed to briefly read this statement without reading glasses. Mr. Sadhwani suggests that it did not matter that he had no reading glasses. He replies that he does not know how to answer this. I do not find his evidence credible.

32. Mr. Sadhwani *[in para. 22 of Submissions]* criticizes that he had not marked out and therefore accepts the following:

The proprietor of [the 1st defendant], Mr. Law and I are good friends. We have known each other for many years, and there are business transactions between us. Sometimes, I would use my vehicle(s) and driver(s) to do the transportation work for the order(s) obtained by [the 1st defendant]. Sometimes, if I cannot finish my own work, I would also ask Mr. Law to arrange his vehicle(s) to transport the goods for me. I would then calculate our respective costs with him later. [The plaintiff] was employed by me for and on behalf of [the 1st defendant]. Originally, Mr. Law and I had a Sale and Purchase Agreement. The Agreement was that he would purchase a container tractor with Registration Number EP 9717 from me. This Agreement between him and me was made orally and there was no signed written documents. Mr. Law agreed that he would purchase my vehicle as mentioned above with HK$120,000.00. *[at D 101]*

He stated that it was only an oral agreement. Counsel submits that the written Agreement *[dated 25 August 2000, at D 133]* was not in existence on the date of the meeting, 4 December 2001. Besides, the written Agreement quoted a price of “$100,000.00” not “$120,000.00”. It was a subsequent fabrication by the 2nd defendant. I agree.

33. He says *[in evidence-in-chief]* that he had told the 1st defendant in the same afternoon after the accident that the plaintiff was day-off. Counsel for the plaintiff asks why he has never mentioned it before. He replies that it was because the plaintiff was the 1st defendant’s employee, not his own employee. I think it obvious that this issue goes to the heart of the plaintiff’s claim. I do not find his evidence credible.

34. I do not find him a credible witness. I have serious doubts in the following:

1. Whether there was any agreement with the 1st defendant for the intended sale of the Truck;
2. Whether there was any agreement with the 1st defendant for the employment of the plaintiff for and on behalf of the 1st defendant;
3. Whether he had ever told the plaintiff that the 1st defendant was the employer;
4. Whether he had given any keys of the Truck to the 1st defendant;
5. Whether the 1st defendant had any possession, custody or control of the Truck.
6. Whether the Truck had missing handrails, a slippery and loose ladder.

*On Lam’s evidence in the 3rd defendant’s case*

35. I find his evidence credible and reliable.

##### The case as found

36. I do not find either the plaintiff or the 2nd defendant credible. I bear in mind the observations of Lord Brandon of Oakbrook in Rhesa Shipping Co SA v Edmonds & Anor., the Popi M [1985] 2 All ER 712, at 718:

… [T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or other wise, deciding on the burden of proof is that only just course for him to take.

…

… [T]he legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

37. The plaintiff has the onus of proof. His oral evidence is rejected. He has failed to prove, on the balance of probabilities, how the accident happened. There is no fact as found to pray in aid *res ipsa loquitur*. The 1st and/or the 2nd defendants, hence the 3rd defendant, are not liable in any way to the plaintiff for the injuries sustained in the accident.

##### The Conclusion

38. I dismiss the plaintiff’s claim against the 2nd and the 3rd defendants. Besides, the plaintiff shall recover nothing from the 1st defendant by way of damages or otherwise.

39. As between the plaintiff and the 1st defendant, I order *nisi* that the plaintiff shall not get the costs of this action. The 2nd defendant is successful in its defence but Tsang is not a credible witness. He has put up a lot of smokescreen in defence. Substantial time and resource have been taken up by the plaintiff to clear up the smokescreen. As between the plaintiff and the 2nd defendant, I order *nisi* that the 2nd defendant shall only get half of the costs of this action, with certificate for counsel. As between the plaintiff and the 3rd defendant, I order *nisi* that the 3rd defendant shall get the costs of this action, subject to any orders already made, with certificate for counsel. The plaintiff’s own costs shall be assessed under legal aid regulations. Such cost orders shall become absolute after 14 days from today.

Dated this 11 January 2006

EDDIE YIP

DEPUTY DISTRICT JUDGE

Mr. Daniel Chan, instructed by M/s Liu, Chan and Lam for the Plaintiff

No appearance from M/s Kenny Tam and Co. for the 1st Defendant, absent

Mr. Lawrence S. K Yip, instructed by M/s Wong, Fung and Co., for the 2nd Defendant

Mr. Kamlesh Sadhwani, instructed by M/s Krishnan and Tsang, for the 3rd Defendant