# DCPI 84/2001

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 84 OF 2001

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BETWEEN

#### LAU KAM NUI, the administratrix

of the estate of Ma Chor Yee, deceased Plaintiff

and

SAU KEE COMPANY LIMITED Defendant

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## Coram: Deputy Judge Yu in Court

Date of Hearing: 15th and 16th January, 27th February 2002

Date of Delivery of Judgment: 27th February 2002

### J U D G M E N T

1. The Plaintiff is the administratrix of the estate of Ma Chor Yee, deceased (hereinafter called “the deceased”). The Plaintiff brings this action on behalf of the deceased’s estate under the Law Amendment and Reform (Consolidation) Ordinance and for the benefits of the dependents of the deceased pursuant to the Fatal Accidents Ordinance. Before bringing this action, the Plaintiff on behalf of the deceased had brought an action in the District Court under the Employees’ Compensation Ordinance, Employees’ Compensation Case No. 708 of 1986 (“the ECC action”). Part of the facts in this case are either agreed or ruled in the ECC action and the parties agree that they are bound by the principle of issue estoppel.

1. There are three main issues raised by the Defendant against liability:-
2. This action is time-barred by the Limitation Ordinance and the Plaintiff is not entitled to proceed with this action save and except for the 3rd daughter of the deceased, PW4 in this action.
3. There was no negligence on the part of the Defendant.
4. If there were negligence, which is not admitted, that does not cause the death of the deceased.

3. The Defendant also raised contributory negligence of the deceased. It is admitted that the burden rest with the Defendant and they have not in fact called any evidence in support of this issue. The main evidence relied upon by the Defendant is the presence of alcohol in the blood of the deceased in accordance to the post-mortal examination. I shall deal with this later.

4. If I find in favour of the Plaintiff on liability, the Defendant also challenged the assessment of damages. I first deal with the question of liability.

## Agreed background

5. The Defendant is and was at the material time a limited company engaged in the business of boat repair. The address of its boatyard was at No. 45 Praya Road, Apleichau. But it also had an office at No. 29 Praya Road. There was a pier behind this office and the Defendant allowed its customers’ boats to be moored for a charge.

6. The deceased was at the material time employed by the Defendant as an unskilled general maintenance worker, and his work included painting the boats and cleaning the hulls. It is not disputed that sometimes equipments would be dropped into the sea. It is conceded by DW2 that the Defendant had to pick up those tools if they fell into shallow water of less than 10 feet deep.

7. On 3rd January 1995, the deceased was working in the cabin of a yacht at No. 45 Praya Road. He took his tea break as usual at 3 p.m. and returned at about 3.30 p.m. He then asked DW1, a welder, to get a rope to help the deceased to retrieve a gas cylinder that had fallen into the sea off the pier at No. 29 Praya Road.

8. Two of them went off to the pier at No. 29 Praya Road. DW1 held one end of the rope and the deceased brought the other end and dived into the sea. After about one minute DW1 pulled the rope and felt it was tight. He therefore inferred that the rope had been tied to the cylinder. He did not pull up the cylinder because he thought that it would be easier for the deceased to come up along the rope. He saw the deceased come up but then the deceased dived down again. The deceased never came up again.

9. It was also found in the said ECC action by Her Honour Judge Chan that the deceased’s employer had told the deceased and DW1 not to dive. DW1, as a skilled worker, could instruct the deceased what to do. The deceased had worked with Mr. Chan, the “boss” of the Defendant, in the water but with his head above the water. The pier was an illegal structure. The cylinder belonged to one Mr. Yeung who had undertaken some repair work on a boat with the use of that cylinder and had left the cylinder on the pier over the New Year holiday. It was not known why the cylinder had fallen into the water. Neither DW1 nor anyone of the Defendant had asked the deceased to retrieve the cylinder.

## The claim of negligence and limitation

10. In order to rule whether the action was statutory barred, one has to analyze the claim by the Plaintiff on the negligent act or breach of contractual duty of the Defendant. Section 27 of the Limitation Ordinance provides that the action for personal injury shall not be brought after three years from the day on which the cause of action accrued or the day (if later) of the Plaintiff’s knowledge. Sub-section 6 read as follows:-

“In this section, and in section 28, references to a person’s state of knowledge are references to the day on which he first had knowledge of the following facts:-

1. that the injury in question was significant; and
2. that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
3. the identity of the Defendant; and
4. ……….

and knowledge that any act omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.”

11. It is not disputed that the accident took place on 3rd January 1995. That would be more than three years from the day when the writ herein was first issued. However, the Plaintiff submitted that a material fact has never been made known to the Plaintiff’s representative and/or dependents, namely that No. 29 Praya Road belonged was used by the Defendant as its office. Outside the office there is a pier that jutted into the sea and the Defendant charged users of the pier for boat moored thereat. They first came to know of this fact at the hearing before Her Honour Judge Chan in the ECC action. The relevant paragraphs in the statement of claim reads:-

“3(ii) The Defendant operated a boat repair and maintenance business at the said Shipyard. As the Plaintiff discovered for the first time on or about 20th January 1998, the Defendant also had premises at 29 Praya Road which was used as an office. Outside the office was a pier that jutted into the sea and the Defendant charged users of the pier fro boat moored thereat at a daily fees of $200 to $300.

1. It was only on or about 20th January 1998 when the application for employees’ compensation came to be heard at the District Court that the Defendant admitted that the Defendant also had premises at 29 Praya Road which was used as its office.
2. In the premises, the estate and the dependents of the Deceased first come to know that they have a cause of action against the Defendant at common law in negligence at the earliest on the 20th January 1998 and/or 21st July 1998 [date when the appeal was allowed].”

12. Those contentions of the Plaintiff were denied by the Defendant.

13. Counsel for the Defendant referred me to paragraph 10 of the Statement of Claim (page 5 of the bundle). He analyzed the particulars of negligence pleaded therein. Save except for the first head of negligence, namely, causing and/or permitting gas cylinders be left on the pier without properly secured or at all, all the other allegations by the Plaintiff is known to the Plaintiff the latest at the Coroner’s hearing or when the ECC action was commenced. Even if the commencement day of the ECC action is used, which was on 6th December 1996, the three years limitation period should have expired on 5th December 1999. Accordingly the writ herein was statute barred.

14. The Plaintiff argued that the facts on ownership of the pier at No. 29 and that the Defendant charges the users have a significant bearing. The issue in the ECC action was whether the deceased died of an accident in the course of his employment. No issue of negligence needed to be determined.

15. In a situation that the accident happened just at the seaside not within the control of the employer, and when the deceased was not working by instruction of his employer (the Defendant), it is impossible for the Plaintiff to argue whether there was any negligence on the part of the Defendant.

16. But in a situation where the deceased got drowned in the employer’s premises (the pier) which happened to extend into the sea, a different consideration does arise. Given the fact that the deceased had to fetch or retrieve equipments from the sea, it would now become at least arguable that it is foreseeable that the worker would enter the sea to fetch for equipments. Since the sea is within the premises of the employer, safety measures had to be taken out against the workers being drowned in the water. Hence, the argument of the particulars of negligence becomes meaningful when the party knows the fact that the pier was occupied by the Defendant and the deceased had to retrieve tools from the sea at the material time.

17. In assessing the knowledge of the Plaintiff, I have to read section 27(8) of the Limitation Ordinance as well. The section provides that a person’s knowledge includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him or from facts ascertainable by him with the help of medical or other appropriate expert advice which is reasonable for him to seek but a person shall not be fixed under this sub-section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and where appropriate, to act on) that advice.

18. No evidence has been given by the Plaintiff on why the ownership of the pier could not be ascertained before the ECC action. And there is no evidence on what reasonable steps having been taken by the Plaintiff to ascertain this material fact. The Plaintiff was represented in the ECC action. Further, there should not be any difficulty in carrying out a simple land search or enquiry to find out the ownership of the pier and the attached office. If there is such difficulty, the Plaintiff should call witness to explain. There is a lot for those acting for the Plaintiff to explain why this fact could not be ascertained or otherwise section 27(8) would fix the Plaintiff with knowledge of this fact.

19. And further, I read from the transcript of the ECC action, which appears at p. 256 of the agreed bundle. The Counsel for the deceased in the ECC action said in the opening:-

“It’s obviously at No. 29 Praya Road where the respondent’s office was located where basically where he was supposed to work.”

20. It appears that Counsel for the Applicant knew at the opening that the Respondent kept an office at No. 29 Praya Road and the deceased was supposed to work there. The Plaintiff should be fixed with such knowledge of his agent that the Defendant had to work at No.29 Praya Road and it was an office of the Defendant. No evidence was called as to the exact knowledge of the Plaintiff or her legal advisor on this matter, or when they knew about it.

21. Page 191 and 192 of the bundle is a report given after the accident to the Factory Inspector of the Labour Department. It is stated therein that the Defendant’s office was situated at 29 Praya Road.

22. Counsel for the Plaintiff tried to make a fine distinction between the office and the pier. I am not convinced. Anyway, if they should know that the Defendant run the office, then it is for the Plaintiff to prove that they could not find out who run the pier. They had not come up with any evidence.

23. On the balance, I found that there is no difficulty for the Plaintiff to ascertain the ownership of the pier before the commencement of the ECC action. They should then be in a position to issue proceedings for the common law claims at least at the commencement of the ECC action. There is no reason why they had to wait until after the trial of the ECC action to take this common law claim.

24. I found that this action had been issued beyond the three years period and is time-barred as far as for the benefit of the deceased, Lau Kam Nui, Ma Siu Yim, and Ma Siu Yan. The time to claim the benefit for Ma Siu Kam does not run until she reach the age of 18, that is, 6th May 1998. This action as far as her claim is concerned is not time-barred.

## Negligence

25. I now turn to consider whether the Defendant owed any duty of care to the Defendant and if so, the measure to be taken. As mentioned above, it is pleaded in paragraph 10 of the Statement of Claim that the Defendant has been negligent. It is also pleaded in paragraph 3 of the Statement of Claim about the implied contractual duty of care of the Defendant. Counsel for the Plaintiff concedes that the particulars under the common law duty and the contractual duty referred to the same matters.

26. As mentioned above, it is not disputed that it is part of the deceased’s duties to retrieve tools or other equipment dropped into the sea. And No. 29 Praya Road is part of the Defendant’s premises. It is foreseeable that the Defendant’s workers including the deceased would work there, including going into the sea. Although it is admitted that the deceased is not expected to dive, he is expected to go into the sea to retrieve tools. It is just common sense that going into the sea would involve certain degree of risk. A reasonable employer should anticipate this risk. I therefore conclude that the Defendant as employer of the deceased should have taken precautions to prevent the deceased from getting drowned. Then the more difficult question is: what are the precautions that should be taken by the Defendant to protect his employees.

27. Paragraph 10 of the Statement of Claim pleaded a number of complaints. It is undisputed that no safety precaution against any hazard by sea was taken out by the Defendant. I am not trying to become an expert myself and there was no expert evidence called. However there was again no evidence as to what precaution was taken by the Defendant. In fact, no precaution had been taken to prevent the deceased from diving except for the oral direction mentioned above. There is no warning or other training for retrieving the tools from the sea safely. Under such circumstances, how could the Defendant say that they have discharged their duty of care?

28. I found that there is no prevention or protective measurement taken out by the Defendant. The oral direction of not to dive is not sufficient as the Defendant expect the deceased to retrieve equipment from the sea. It is foreseeable that a worker may be careless, or over-conscientious, to dive and retrieve the equipment. In the circumstances, the Defendant must be negligent in not providing any safety measure for their workers.

29. The defence counsel raised a second point. He submitted that even if the Defendant was negligent, the death of the deceased might not be caused by the negligence of the Defendant. The onus of the proving rested with the Plaintiff.

30. In principle I agreed with his argument. But this is just a bare denial from the Defendant. I see no difficulty in inferring from the circumstances that the death was caused by the negligence of the Defendant.

## Contributory Negligence

31. In this aspect, defence counsel relied upon the fact that the deceased had taken a substantive quantity of alcohol before he entered the water. He submitted that that could be reflected from the Coroner’s report. However the defence counsel had not called any expert to explain the effect of the alcohol level at the deceased body that might had affected his behaviour or judgment. And the Defendant’s witness, DW1, said that he did not notice that the deceased was under the influence of alcohol. Surely he was the person who last saw the deceased and would be in a position to assess the behaviour of the deceased. If he could not observe anything, then there was no evidence on how the alcohol had affected the deceased. As the onus rests on the Defendant, I found that they have not proved any contributory negligence on the part of the deceased.

## Quantum

32. I therefore concluded that the death of the deceased is caused by the negligence of the Defendant. I now turn to the assessment of quantum, which is in effect the loss of dependency of PW4. In assessing the damages, I have to determine if PW1 and PW3 are dependents of the deceased. Though they are not entitled to claim against the Defendant, the finding whether they are dependents affects the quantum of the damages for PW4.

33. I shall take PW3 first. At the material time of the death, she had been working and was earning around $9,000 a month. It is true that she is still staying at home but it is quite obvious that she does not rely on the deceased. Possibly she was earning more than her father.

34. Plaintiff’s counsel argued that PW3 was staying at home and was making no contribution. So she was still relying on the deceased by getting a free home with meal and lodging. While she stayed in the family, it does not necessarily mean that she was depending on her father. Her father may not ask her to contribute to the household expenses. But that is not dependency on the family. The question is whether she depended on her father to provide her with the lodging and the meal. I found that she was not. Further in support of my finding is that, in the ECC action, she had not claimed to be a dependent on the deceased. I therefore conclude that she was not a dependent of the deceased at the time of his death.

35. As for the wife, PW1, the defence counsel also submitted that she was not a dependent on the deceased. As a matter of fact, she earned about $8,000 a month, an income higher than the deceased did. Both of them would contribute to the joint expenses of the family, which is about $8,500 a month. According to PW1, the deceased would pay her $4,000 a month and she would also contribute the balance. On this issue the Plaintiff’s counsel referred me to the case of *Burgess v. Florence Nightingale Hospital for Gentlewoman & another [1955] 1 QB 349*. It is stated in the headnotes that:-

“When a husband and wife with either separate incomes or a joint income were living together and sharing their expenses, then each, by the fact of the sharing, was conferring a benefit on the other which arose from the relationship of a husband and wife; and accordingly, there was a benefit which came within the Fatal Accident Act, it was therefore recoverable by the husband.”

36. The defendant in that action did in fact not challenge this principle. What was in issue was whether there is sufficient evidence to prove that the husband was dependent on the wife. It was ruled by Devlin J. that when both were earning equally and they both contributed equally, each is contributing to the joint living expenses by the way in which they were discharged. And in consequence of the fact that the joint living expenses are less than twice the expenses of each one living separately then each by the fact of the sharing is conferring a benefit on the other. I agree with that principle of law.

37. In the current situation, a substantive part of the household expenses go to the education of the children. If they were living separately, then the expenses of each of them would be higher than his or her contribution to the joint expenses. In the circumstances there is a benefit to PW1. I therefore found that PW1 is also a dependent on the deceased.

38. In conclusion I found that there are 3 dependents on the deceased, namely, PW1, PW2 and PW4. (The Defendant does not dispute the dependency of PW2.)

39. Plaintiff’s counsel submitted that a multiplier of 7 should be used for assessing the damages of the deceased. I agree. Using 7 as the multiplier, the dependency of PW4 would be 6 years.

40. Defence Counsel submitted that the deceased could not have contributed $4,000 a month to the family because he was earning less than that. He also referred me to the tax return and the evidence of DW2.

41. That is a very attractive argument. But my determination is the monthly contribution brought home by the deceased. The person who knows about the money brought home by the deceased must be PW1. DW2 would not know if the deceased had other source of income. And I have considered the evidence of PW1 who was cross-examined by the Defence counsel on this issue. I found that she is a credible witness. I therefore accept her evidence that the deceased did contribute $4,000 a month to the family.

39. In conclusion, there would be 3 dependents on the deceased, and the loss of dependency to PW4 would be based on $1,000 per month ($4,000/4). The loss of dependency to PW4 should be ($4,000/4x12x6) and I award accordingly a sum of $72,000 to the Plaintiff with interest thereon at ½ judgment rate from date of accident until today and thereafter at judgment rate until payment.

40. The Defendant has paid $117,000 to the Plaintiff under the ECC action. Defence counsel argued that this should be set off against the above award.

41. However, while the action is statute barred, it does not mean that the action is extinguished. If it were to be a set off, the judgment in the ECC action should be set off against the damages of the Plaintiff, including the part that is statute barred. Given my ruling, the Plaintiff should have recovered more than $117,000 + $72,000, had the major part of the action not been statute barred. I therefore make no deduction against the above award.

42. I award costs of this action to the Plaintiff with certificate for counsel. The Plaintiff asks me to include, as part of their costs, the costs they incurred in HCMP 3176 of 2001. I do not have jurisdiction to direct the Defendant to pay the Plaintiff’s costs in another action. Since the costs in HCMP 3176 of 2001 has not been claimed as a liquidated sum, I dismiss this part of the Plaintiff’s application. I also order that the Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.

( R. Yu )

Deputy Judge

Mr. Wong Hay-yiu instructed by Messrs. Lau Pau & Co, for the Plaintiff.

Mr. Chan Chi-hung instructed by Messrs. Hastings & Co, for the Defendant.