# DCPI 163/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 163 OF 2006

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BETWEEN

## NGAI SAU SEN (倪壽辰) Plaintiff

### and

Soabar Systems Hong Kong B.V.

trading as Avery Dennison Hong Kong B.V. Defendant

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Coram: Her Honour Judge M. Yuen in Court

Dates of Hearing: 15th –17th & 20th November 2006

Date of Handing down Judgment: 17th January 2007

**JUDGMENT**

1. This is a personal injury compensation claim of the plaintiff against the defendant, his former employer, for a sprained back injury.

### *The Events*

1. The plaintiff was employed as a warehouse assistant by the defendant on 1 April 2004 for a period of 3 months. His duty was to stack woven garment labels onto the shelves of the warehouse of the defendant company.
2. On the morning of 6 April 2004 whilst at work within the warehouse the plaintiff sustained low back injury. The plaintiff was escorted to the casualty department of Princess Margaret Hospital for medical consultation shortly after the incident.

***The Injuries sustained by the plaintiff***

1. There was no dispute that the plaintiff sustained low back injury on the morning of 6 April 2004. One of the supervisors Lai Kwok Leen (DW3) recalled the plaintiff had told him that the plaintiff had formerly sustained low back pain on a previous occasion. In accordance with the thin skull rule, an employer has to accept his employee as he finds him. Should the defendant’s negligent act aggravate the low back pain of the plaintiff, the defendant would still be responsible for the extent of aggravation to the plaintiff’s pre-existing condition.
2. Apart from the dispute about the suitability of a few heads of expenses, the defendant took issue with the plaintiff mainly on the events which gave rise to the plaintiff’s low back injury.

***Causation of the plaintiff’s Injury***

1. In the plaintiff’s statement of claim lodged with court on 1 March 2006, his witness statement written on 29 May 2006 and his verbal testimony given in court on 15 November 2006, the plaintiff was adamant that he sustained his low back pain when he bent his body backwards to avoid the approach of the trolley of his colleague ‘Ah Shui’.
2. However the plaintiff gave a different causal account to his supervisors shortly after the plaintiff sustained his low back injury. The plaintiff told his supervisors he sustained his low back injury as he was picking up boxes of woven labels from the lower level of the push trolley.
3. Basing on the account the plaintiff gave to his supervisors the defendant does not accept the plaintiff’s back injury to have been caused by the negligent act of his colleague ‘Ah Shui’.
4. In the course of exchange of pleadings and witness statements, the defendant wrongly identified the ‘Ah Shui’ referred to by the plaintiff as warehouse assistant Chan chak-sui.

10. After obtaining further discovery from the defendant of the staff list of the defendant shortly before the trial, the plaintiff suggested the ‘Ah Shui’ he was talking about could have been Mr. Kwok King Shui who joined the defendant company on 2 April 2004 and left the employment of the defendant about a week later on 11 April 2004.

### *Evidence about the accident*

11. In the solicitors’ letter before action of 8 September 2005, the complaint of the plaintiff was recorded as “When his colleague pushed the said trolley towards our client, he (the plaintiff) tried to avoid being hit and lost his balance. As a result of accident, our client sprained his back.”

12. In the subsequent letter of 6 January 2006 it was said, “… our client was, in the course of employment with his employer, assigned to unload some rolls of silk from a trolley (the Trolley) onto the racks inside the warehouse. When our client was holding the last roll, his colleague ‘Ah Sui’ pushed the Trolley towards our client. To avoid being hit, our client bent backward. He did not fall on the ground. His back hit the rack. As a result, he sprained his back.”

13. In the statement of claim filed with court on 1 March 2006 the plaintiff pleaded: “in course of his employment the Plaintiff was assigned to unload some goods from a trolley (the Trolley) onto some shelves/racks inside the warehouse. While he was holding the last roll of goods, his colleagues ‘Ah Sui’ negligently pushed the Trolley towards the plaintiff without any prior notice. To avoid being hit by the Trolley, the plaintiff bent backward and lost balance. His back hit the shelves/racks and he sustained injury to his lower back.”

14. In the witness statement written on 29 May 2006 the plaintiff said “…. each roll of silk labels weighed about 20-30 pounds….. when I was about to finish loading the silk labels, a co-worker ‘Ah Sui’ came to me. He said he wanted to use my trolley because there was no other trolley available outside. I took up the last roll of silk labels with my hands, turned my waist and was about to put it onto the metal rack; at that moment, Ah Sui was too impatient to wait and he pushed the trolley. Because the passageway was narrow and I was standing right in front of the trolley, naturally, my instant reaction was to move away from the trolley immediately. I turned my body backward and immediately, I felt a severe pain in the lower back.”

15. Whilst in court during cross-examination the plaintiff gave a verbal narration of the manoeuvre of the trolley by ‘Ah Shui’ with reference to a diagram the plaintiff drew in court. According to the plaintiff’s diagram and his verbal explanation ‘Ah Shui’ would be pushing the trolley away by pushing the trolley on the side adjacent to the push handle. Such a disposition is a rather unusual and unnatural, though not impossible, posture to adopt in the handling of a trolley with a push handle.

16. If the plaintiff’s description given in his statement and his pleading were correct ‘Ah Shui’ was verging upon a malicious act or at least a grossly negligent act in pushing the trolley towards the plaintiff when ‘Ah Shui’ was taking the trolley away from the plaintiff. It was subsequently learnt from the plaintiff’s answers in his cross-examination that the plaintiff did not seek to say ‘Ah Shui’ was pushing the trolley towards him when ‘Ah Shui’ was wheeling the trolley away.

17. In his evidence in chief the version of the plaintiff was: On 6 April there was an accident. ‘Ah Shui’ pushed the trolley towards me. When I resumed working on 19th April ‘Ah Shui’ was no longer working for the defendant company.

18. When asked in cross-examination to give a more detailed description of the events the plaintiff said, “When I was moving the last lot of goods, Ah Shui came over. He was urging me to move the goods quicker because there were not enough trolleys outside. He needed the trolley….. I lifted the last lot of goods, about to turn round to place it onto the metal cage. When I turned around, he started to push the trolley. Because there was no other way, there was only one way out…. I very naturally bent a little to avoid the trolley. When I was trying to avoid it there was a sudden pain on my back. I couldn’t hold onto the goods. The goods fell onto the ground. There was the metal frame of the rack behind me. I leaned against the metal rack and ‘Ah Shui’ asked me what’s the matter.”

19. When asked for further elaboration, the plaintiff said “When I was bending over to lift the goods and was about to put the goods onto the cage, he moved the trolley. It seems to me he moved the trolley a bit outwards….. When I was lifting the goods, I was not paying attention to the trolley. I had the feeling that the trolley had been moved. At the same time I moved a bit to avoid it. At the time I was trying to avoid it I felt a great pain.”

20. When asked if the plaintiff was facing the trolley when the plaintiff moved the last lot of goods from the trolley, the plaintiff agreed. When further asked if he saw ‘Ah Shui’ holding onto the handle of the trolley to push trolley, the answer of plaintiff was “As to whether he was holding onto the handle or the side of the trolley, I did not pay attention.”

21. When asked if the trolley moved towards the plaintiff, the plaintiff said: “No, I believe not. The trolley did not hit me.” When asked if the trolley did not move towards the plaintiff and did not hit the plaintiff, did the plaintiff move one step backwards, the plaintiff said: “When I lifted the goods, I noticed that the trolley had moved. My first reaction was to avoid it. … I bent backwards to avoid it.” When asked whether the plaintiff has bent his upper body without moving his legs, the plaintiff’s answer was: “My legs not moved.”

22. When it was suggested to the plaintiff he over-reacted, the plaintiff responded by saying: “It’s just natural to try to avoid it. You know the vehicle would not hit you, you would try to jump away to avoid it. I don’t think I over-reacted. It’s just natural for me to avoid being hit.”

23. It is quite apparent that the plaintiff provided changing versions of the motion of the trolley. In his instruction to his solicitor and in his pleadings, the plaintiff was adamant that ‘Ah Shui’ was pushing the trolley towards him and he sprained his back when he tried to avoid the approaching trolley of ‘Ah Shui’.

24. When asked by counsel in cross-examination the plaintiff said he did not see how ‘Ah Shui’ manoeuvred the trolley. Rather the plaintiff sensed the trolley moved. He bent his upper body backwards subconsciously to avoid being hit by the trolley. The trolley did not hit nor touch the plaintiff in the incident.

25. The bending of a person’s upper body backward as opposed to his stepping aside to avoid the approach of a waist high trolley travelling on the ground is slightly beyond one’s reasonable or logical understanding. To push a trolley not by its push handle is a rather unnatural and unusual posture to adopt.

26. The plaintiff was shown the medical report compiled by the doctor in the casualty department of Princess Margaret Hospital. In the medical report Dr. HAU wrote “The mode of injury was compatible with sprain back due to lifting heavy objects.” The plaintiff was asked if he had told the doctor at the casualty department that his injury was occasioned on account of the plaintiff’s lifting of heavy objects. The plaintiff agreed and said, “I suppose so. I complained about back pain.”

27. I accept the plaintiff does speak fast and with an accent. It was possible for some miscommunication to creep in during conversation if one does not have the patience to seek clarification from the plaintiff on some of the words used by the plaintiff.

28. One may be tempted to think that the plaintiff could, possibly for the benefit of his colleague, have omitted to mention the involvement of a colleague in order to avoid his colleague from getting into trouble. Miscommunication, however, was not the plaintiff’s case. The plaintiff did not say he skipped telling supervisor Chung the negligence of ‘Ah Shui’ to avoid ‘Ah Shui’ from getting into trouble. Rather it was the plaintiff’s case that supervisor Chung never asked him about the cause of the plaintiff’s injury.

29. It was possible for someone to have missed out a few words of the plaintiff or might have to ask the plaintiff to repeat what he was saying in order not to misunderstand what the plaintiff was trying to say in those words. To have the complaint of the negligent colleague ‘Ah Shui’ and the approach of the trolley of ‘Ah Shui’ left out altogether is highly improbable.

30. It was suggested to supervisor Chung Pok Man (DW1) that he had been too busy with his work on the date of the accident that he had forgotten to ask the plaintiff how the plaintiff sustained his injury. I find this to be an unjustified criticism on Chung. Chung was able to point out (in his witness statement) the plaintiff had reported carrying boxes of labels as opposed to rolls of labels as described in the plaintiff’s statement and the statement of claims. If Chung had the time and patience to find out from the plaintiff minor details about the incident such as the type of goods that the plaintiff was holding, it would be quite illogical to suggest Chung missed out asking the most important aspect of the incident, i.e. the cause of the plaintiff’s injury, when Chung has an obligation to report about the incident to the defendant company.

31. I found supervisors Chung Man Por (DW1) to be honest about the fact that the plaintiff never mentioned to him about avoiding the moving trolley of his co-worker ‘Ah Shui’.

32. The plaintiff suggested though he never told supervisor Chung about the negligent act of ‘Ah Shui’, he had nonetheless told his escorting supervisor Lai Kwok Leen about the approach of the push trolley of ‘Ah Shui’.

33. Lai Kwok Leen (DW3) was summoned to attend court at the last minute when Lai’s name was being mentioned by the plaintiff at the trial. Lai did not recall the plaintiff informing him of the plaintiff’s back injury to have been caused by the negligent wheeling of the push trolley by a co-worker. Lai only recalled during the taxi journey to the hospital the plaintiff told him the plaintiff sprained his back at the goods rack. Lai also recalled the plaintiff to have mentioned to him that the plaintiff had told his fellow warehouse assistant Leung Man Kwong about the incident.

34. Attacks had been made about the failure of the defendant to disclose the accident investigation report compiled by the safety officer of the defendant after the safety officer interviewed the plaintiff about 2 to 3 weeks after the incident, on about 28 April 2004. I accept the failure to disclose was not a deliberate act of the defendant to avoid revealing what was contained in the accident investigation report. Counsel on behalf of the defendant did offer in court that should application be made for disclosure of the report, defence counsel would advise the defendant to waive its claim of privilege against disclosure of the report.

35. I accept Mr. Chung’s evidence that the plaintiff had not mentioned about the negligent ‘Ah Shui’ to Chung on the day of the incident. Nor had the plaintiff talked about the moving trolley of the co-worker ‘Ah Shui’ in the presence of DW1 when the plaintiff was interviewed by the safety officer on about 28 April 2004 for a re-construction of the incident.

36. The doctor at the casualty department of the hospital was totally unrelated to the defendant company. It is inexplicable for the plaintiff not to have informed the doctor at the casualty department of the hospital the real cause of his back injury.

37. There is no probable explanation why the plaintiff did not give an account of the negligent act of ‘Ah Shui’ when the plaintiff was interviewed by the safety officer on about 28 April 2004 since ‘Ah Shui’ had already left the employment of the defendant at the time of the interview.

38. On the evidence made available in court, I accept on balance the plaintiff could have sustained his low back injury on account of some acts he engaged in whilst carrying out his work on the morning of 6 April 2004. Nevertheless all the spontaneous surrounding circumstances do not support the plaintiff’s subsequent account that he twisted his back because of the negligent wheeling of the push trolley by his co-worker ‘Ah Shui’.

39. There was some uncertainty about the weight of the load that the plaintiff was carrying at the time he sustained his low back pain. In his witness statement the plaintiff estimated the stack of labels he was carrying could have weighed about 20-30 pounds. When he recounted the events to Dr. Poon during one of his medical examinations, the plaintiff described the load to be weighing about 15 pounds. DW1 displayed a photograph to show 10 boxes of labels generally weighed about 5 kg. As the plaintiff did not rest his case on carrying unduly heavy load in the course of his duties, the weight of the load is not an essential factual issue to resolve.

40. Had there been pleading or evidence to disclose the actual act which gave rise to the plaintiff’s low back injury, this court would have considered the suitability of granting the plaintiff leave to amend his pleading, or on the principles elaborated in Court of Final Appeal’s decision in ***Hsin Chong Construction*** FACV-18/2003 to find the acts that gave rise to the plaintiff’s low back injury.

41. As the pleading and the evidence now stand, there is insufficient information on which this court could come to a fact finding, on balance, of the causal act which gave rise to the plaintiff’s low back injury. This rendered impossible the assessment of whether such act arose out of the negligence of the defendant.

42. For completeness sake I ought to mention the fact finding of this court on one factual disagreement between the plaintiff and the defendant. The plaintiff was adamant that he only viewed the industrial safety training optical disc provided by the defendant on 19 April 2004. The company’s written record however showed the plaintiff to have viewed the industrial safety disc on the first day of his employment, i.e. on 1 April 2004. I do accept on balance, the defendant company is correct about the day on which the plaintiff was shown the industrial safety tape.

43. Had the plaintiff’s injury been caused by the inappropriate posture of the plaintiff in the handling of a heavy load, the time of the viewing of the industrial safety tape by the plaintiff would have been material in determining the extent of negligence of the employer.

44. As the plaintiff rested his case on the negligent and inappropriate trolley pushing motion of his co-worker, the date of the viewing of the industrial safety tape by the plaintiff is not directly relevant to the pleaded negligence of the co-worker.

45. As the evidence adduced by the plaintiff cannot lead this court to a fact finding on the causal act which gave rise to the plaintiff’s low back injury, the plaintiff failed in his action against his former employer, the defendant.

***The Plaintiff’s Injuries***

46. Had the plaintiff managed to succeed on liability, the quantum of compensation the plaintiff would likely obtain would have been the following:-

**P.S.L.A.**

47. Parties have agreed the sum of HK$120,000 to be the appropriate award for P.S.L.A. suffered by the plaintiff.

#### Pre-trial Loss of earnings

#### 48. Parties agreed the plaintiff’s pre-trial loss of earnings should be quantified at HK$6,500.

#### Future Loss of Income

49. There is no claim for future loss of income.

#### Medical Expenses

50. Though the plaintiff only produced 3 receipts in respect of his medical consultations, I accept he did spend a total of HK$1,300 in respect of his medical consultation (Payment of HK$100 to Princess Margaret Hospital, HK$400 to Tuen Mun Hospital and HK$160 x 5 visits to Dr. Choy Si Ho) since Dr. Choy had granted sick leave to the plaintiff on 5 occasions.

#### Massage Treatment

51. The plaintiff gave an account of visiting Shenzhen for massage treatments to ease his back pain. He gave the account of visiting a Chinese herbalist for pressure point massage at the beginning of his visits to the mainland. He later changed to have massage service in massage parlours where he would stay overnight in the massage establishments.

52. Defence objected to the necessity of visiting Shenzhen for massage treatment when the plaintiff could have the same treatments in Hong Kong.

53. I take judicial notice of the commonly known fact that massage service offered in Shenzhen is much cheaper than the same type of service available in Hong Kong. I do accept it is reasonable to have pressure point massage from herbalist to ease the plaintiff’s back pain. Nevetheless I do have reservation about the need of attending entertaining massage parlours for overnight visits rather than therapeutic massage treatments from an herbalist.

54. For the massage service, I am only prepared to accept half of the claimed sum, i.e. HK$2500, in respect of the visits made to the herbalist in Shenzhen to be reasonable. Thus for the plaintiff’s travelling expense to visit the herbalist for therapeutic massage, I do consider a sum of HK$3,250 (being half of the claimed sum of HK$6500) to be a reasonable travelling expense.

**Morale counseling course**

55. In the plaintiff’s explanation in court, he attended a counselling course to establish his own confidence when his girlfriend chose to leave him. This sum ought not be considered as part of the compensation sum as I do not accept on balance there is a direct nexus between the low back injury of the plaintiff and the departure of his girlfriend.

#### Tonic Food

56. The plaintiff’s ex-girl friend prepared some nourishing soup for the plaintiff free of charge. There was no out-of-pocket expense by the plaintiff in respect of the nourishing soup. Nevertheless I do consider a sum of HK$700 represented the reasonable cost for the purchase of massage cream for the plaintiff’s low back pain.

#### Future Medical Expenses

57. I accept Dr. Poon’s recommendation that the plaintiff should receive future physiotherapy treatment to help the plaintiff to ease his back pain. I accept the cost of HK$6,000 to be a reasonable sum for such physiotherapy treatment.

#### Loss of Earning Capacity

58. The plaintiff sought compensation in the sum of HK$50,000 for loss of his earning capacity as the plaintiff had not been able to retain his warehouse attendant work on account of his injury. It was the plaintiff’s evidence that he had been dismissed in a number of his employments for his slowness at work when the plaintiff was engaged as a warehouse assistant after the present incident.

59. I accept the remaining discomfort suffered by the plaintiff on account of his low back pain would have lowered the plaintiff’s general competitiveness in the job market and assessed his loss of earning capacity to be HK$10,000.

#### *Heads of Compensation*

60. Since this court is not able to reach a fact finding on the causal act which brought about the back injury of the plaintiff, no order for compensation could be made. Had 100% liability been established, I would have granted the plaintiff the following compensation sum:-

PSLA $120,000

Pre-trial loss of earnings $6,500

Medical expenses $1,300

Massage Treatment $2,500

Travelling expenses $3,250

Massage Cream $700

Future Medical Expenses $6,000

Loss of Earning Capacity $10,000

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HK$150,250

Less Employee compensation

Received ($31,966.67)

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HK$118,283.33

#### *Costs Order*

61. I award costs order nisi in favour of the defendant in respect of the costs of this action with the quantum to be taxed if not agreed between the parties, with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations.

( Mary Yuen )

District Judge

Representation:

Mr. Andy HUNG instructed by Messrs. Au Yeung, Cheng, Ho & Tin assigned by D.L.A. for the Plaintiff.

Mr. Charles WONG instructed by Messrs. Deacons for the Defendant.