DCPI 396/2013

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURY ACTION NO 396 OF 2013

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###### BETWEEN

FOK CHICK YEUNG APPLE Plaintiff

and

i-CABLE TELECOM LIMITED Defendant

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Before: Deputy District Judge Kam K. L. Cheung in Court

Date of Hearing: 7, 10 & 11 August 2015

Date of Judgment: 15 October 2015

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JUDGMENT

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1. This is an action by the Plaintiff for damages for personal injury sustained by him in the course of his work on 10th October 2010. His case is that he sustained an injury to his head as a result of his attempting, in the spur of the moment, to catch an object that was falling out from a van belonging to his employer.

*The Background*

1. The Plaintiff joined the Defendant in March 2010 as a technician. His job was to install or fix cable TV reception devices. In the morning of 10th October 2010, Mr. Ma Hon Fai (“**Ma**”), the Plaintiff’s team leader, carried the Plaintiff and his colleagues in a van (“**the Van**”) to various destinations so that they could attend to work on the premises of the Defendant’s customers. Upon arriving at On Kay Court in Kowloon Bay, the final and the Plaintiff’s stop, Ma alighted from the Van to open the tailgate to allow the Plaintiff to get the devices and tools that he needed for his job. As the tailgate was being opened but before it was fully open, the Plaintiff, who had been standing a few feet away from the Van, dashed forward and had his head bumped into the tailgate.

1. The tailgate was hinged at the top of the Van and opened upwards 90 degrees from a vertical to horizontal position. The Plaintiff stands some 5’ 8”. When the tailgate is fully open, there should be some clearance between the Plaintiff’s head and the tailgate.

*The Plaintiff’s Case*

1. In the Statement of claim, it is claimed that as Ma was opening the tailgate of the Van, the Plaintiff noticed that a box containing computer equipment was falling or going to fall out from the goods compartment. As a result, the Plaintiff dashed forward in an attempt to catch the box. However, as the tailgate was defective and could not open fully, he had his head bumped into the edge of the tailgate.
2. In his first witness statement, the Plaintiff says that object that was falling out from the Van was a bag rather than a box. In his supplemental witness statement, he goes back to the original version and says what he saw was a box.

1. Mr. Yip, counsel for the Plaintiff, submits that the Plaintiff’s case is two-fold: first, the Defendant is liable for providing a van with a defective tailgate; secondly, irrespective whether the tailgate was defective, the Defendant is liable for failing to take steps to ensure that objects carried in the Van would not fall out from it. Mr. Yip argues that it is reasonably foreseeable that an employee in the position of the Plaintiff would, on seeing that his employer’s property is about to fall out from the Van, dash forward in an attempt to catch it as a matter of instinct.

*The Defendant’s Case*

1. In the Defendant’s Defence, it is pleaded that: -

“7. (j) At the time Mr. Ma opened the rear door for the Plaintiff at the Scene, the rear door operated as usual and was in normal condition. Mr. Ma opened the rear door by holding the door’s edge gently with both of his hands, until the door fully opened.

(k) While the rear door was raised in the mid-way as such, the Plaintiff’s tool-bag was about to fall. At this moment, the Plaintiff dashed forward in an attempt to hold his tool-bag. In the course, the Plaintiff’s head hit the rear door of [the Van].

(l) At the material times, the rear door operated in its normal condition and was not defective as alleged or at all.”

1. Thus, on the pleadings, it is not disputed that something, be it a box or a bag, was falling or about to fall out from the Van. Nor is it disputed that the Plaintiff did hit his head on the tailgate. However, Mr. Lim contends that the falling object did not cause the Plaintiff to dash forward. “*Since the Plaintiff could not tell what the object was there was no causation between the object falling out and his dashing forward and injuring himself*”, Mr. Lim submits[[1]](#footnote-1).
2. Although the argument is raised in the context of causation, I also take it to mean it is not reasonably foreseeable that an employee in the position of the Plaintiff would dash forward to catch an object which he did not know was worth saving.

*Liability - Analysis and Findings*

1. There are inconsistencies in the Plaintiff's evidence. For instance, he has changed his evidence a few times as to whether the falling object was a box or a bag. Mr. Yip, the Plaintiff’s counsel, submits that the Plaintiff is an unsophisticated person who is not capable of attending to details. Contrary to Mr. Yip's submission, the Plaintiff impresses me as an extremely clever man. He is more than capable of and will not think twice before changing his evidence to meet challenges mounted against his case. Mr. Lim, relying on among others the following matters, submits that the Plaintiff is not a reliable witness.

(1) There is no evidence whatsoever that the tailgate was defective and could only be opened half way. The reference to a defective tailgate is, Mr. Lim submits, which I agree, nothing but an afterthought or total fabrication made to explain why the he managed to hit his head on the tailgate.

(2) Under cross-examination, the Plaintiff changed his evidence again and said that he did not know what fell out from the Van.

(3) The Plaintiff did not mention any falling object in the incident report. Nor did he tell the doctors at the A&E of United Christian Hospital that he hit his head because he had a falling object to catch.

(4) The history of employment given by the Plaintiff is highly selective and piecemeal if not actually untrue.

1. I agree with Mr. Lim that the Plaintiff is a witness who at times is determined not to tell the truth. I have no doubt in rejecting his evidence that the tailgate was defective. Not only is the allegation not supported by any reliable evidence, it is contrary to the very convincing evidence of Ma. In fact, realising how bad the defective tailgate point is, Mr. Yip, without formally abandoning the point, does not rely on it in his written Closing Submissions.

1. My doubt over the general credibility of the Plaintiff nonetheless, the Plaintiff’s case must be evaluated in the light of other evidence. Ma, the Defendant's witness, says in paragraph 17 of his witness statement that he was aware that a toolbox like object was falling or about to fall out from the goods compartment of the Van and noticed that the Plaintiff dashed forward in an attempt to catch it. At trial, Ma confirmed that there was indeed a bag on the ground, which he believed was the object that had fallen out from the Van. Mr. Lim, in an attempt to neutralise Ma's evidence, argues that Ma did not actually see what he says he saw. With respect to Mr. Lim, I am not impressed by the argument. The fact is, Ma, who impresses me as a completely honest and forthcoming witness, knows it better than anyone what he saw or did not see. If he says he saw a falling object, I have no reason to believe that there was none. It should be noted that Ma did not retract or part with what he says in his witness statement. Mr. Lim's argument that Ma did not actually see the falling object flies in the face of his own witness's evidence. It is also important that it is expressly pleaded in the Defence at §7(k) that the Plaintiff dashed forward to catch a bag. On the evidence before me, I find that there was indeed a falling object and that it was the falling object, be it a box or a bag, that caused the Plaintiff to dash forward.

1. In so holding, I reject Mr. Lim’s contention that the accident “just happened” and that there did not exist any causal link between the falling object and the Plaintiff’s act of dashing forward. I am mindful that the Plaintiff did not mention any falling object in the incident report or his description of the accident to the doctors at the A&E of United Christian Hospital. However, the absence of a reference to the falling object does not in my view start to cast doubt on the evidence of Ma that the Plaintiff did dash forward to catch a falling object.
2. Mr. Lim also argues that even if “*the Plaintiff was able to see what the object that was falling out was, there simply would not have been sufficient time for him to dash forward bearing in mind that the time gap was less than 2 seconds.*”[[2]](#footnote-2) It is said that it took less than two seconds for the object to drop to the ground and the Plaintiff needed more than one second to react to what he saw. Referring to the braking and stopping distances in the Road Users’ Code, Mr. Lim argues that the Plaintiff did not have enough time to react and therefore would not have dashed forwarded in an attempt to catch the falling object. Mr. Lim’s argument, interesting though, is not built on any actual evidence. His estimates that the falling object would land on the ground in less than two seconds and that the Plaintiff needed at least one second to react to what he saw are nothing but estimates that are plucked out of the air. The reference to the Road Users’ Code is in my view not useful. In any event, even if the rescue attempt was bound to fail, it does not mean that it was not undertaken. Although one may with the benefit of hindsight say that the rescue attempt was bound to fail, such benefit of hindsight, which was not available to the Plaintiff, does not kill the instinct on which he acted.

1. The issue that follows is whether it was foreseeable that items carried in the goods compartment might fall out from it when the tailgate was opened.

1. Among the objects carried in the compartment were expensive computer devices and accessories, which were kept in boxes, and inexpensive tools, which were kept in bags. According to the Defendant's witness, the boxes were pushed towards the end of the goods compartment so that they would not fall out from the compartment when the tailgate was opened. Given that the Defendant's witness saw a need to push the computer devices and electronics towards the end of the compartment, there must be a foreseeable if not known risk that the items carried in the compartment might fall out from it when the tailgate was opened.
2. *Is it reasonably foreseeable an employee in the position of the Plaintiff would dash forward to catch the falling object?* That is the other issue that the parties have debated over. Mr. Yip, relying on the "agony of the moment" argument, submits that it is not reasonable to require the Plaintiff to decide on the spot whether he should or should not dash forward to catch the falling object. Mr. Lim, on the other hand, submits that the "agony of the moment" argument cannot be raised if the danger that causes a person to take immediate reaction does not involve a danger to the person. Given that the danger in question would only cause property damage, Mr. Lim argues, the Plaintiff cannot avail himself of the "agony of the moment" argument.

1. In furthering his argument, Mr. Lim relies on the following passage in *Clerk & Lindsell on Torts* (21st ed., at §2-126-127):

“**2-126 Emergency or dilemma** Conduct, whether on the part of a third party or the claimant himself, will not constitute novus actus where it is a panic or reflex reaction to a position of immediate danger created by the defendant’s wrongdoing. So in *Scott v Shepherd*, the intervention of bystanders who tossed away the lighted squib thrown by the defendant did not exculpate him from liability to the claimant who was ultimately injured by that squib. In *Brandon v Osborne Garnett Co. Ltd.*, a skylight crashed into the roof of a shop where the claimant was standing with her husband. She instinctively clutched her husband and tried to pull him out of danger. The defendants were liable for the injury occasioned to her by straining her leg.

**2-127 Rescuers** On analogous principle a deliberate act of rescue will never virtually constitute a novus actus. The defendant will not be allowed to absolve himself for responsibility for the consequences of a danger which he had created. Rescue may be an act of “conscious volition” but it is a normal, reasonable and definable response to another’s plight. The cry of distress is a summons for relief.”

1. Reliance is also placed on the following passages in *Charlesworth and Percy on Negligence* (13th ed., §4-08 and 4-09)

“**4-08 Dilemma Created by another negligence.** The “rescue” cases also serve to illustrate the approach where someone is placed in a position where they reasonably expose themselves to risk. Where, negligently, one party places another in a situation of danger, it does not amount to contributory negligence if the other, in reacting, does something which with the benefit of hindsight was a less than optimum solution. As Lord Hailsham put it:

“Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.”

**4-09** The more agonising the dilemma in which a claimant is placed, the less critical anyone should be of the reaction. The court will usually balance the risk taken against the consequences of the breach of duty. This could involve weighing the degree of inconvenience or danger to which a person he had been subjected, with the risks incurred in an effort to do something about it. In *Sayers v Harlow Urban District Council* the Claimant, finding herself locked in a lavatory cubicle, attempted unsuccessfully to get out by climbing over the top. As she was trying to return to floor level she fell and injured herself. It was held that, whilst it was reasonable in the circumstances for her to explore the possibility of escape in the manner she did, she was careless in the process of climbing down by allowing her balance to depend on a rotating toilet roll.”

1. Nothing in the above-quoted passages, which primarily deal with the question of causation, lends support to Mr. Lim’s contention that a claimant cannot run the agony of the moment argument if the emergency situation negligently created by a defendant does not cause a danger to the person. There are, in fact, authorities to the contrary. In *Clerk & Lindsell on Torsts* (21st ed., at 8-31), it is said:

“**Rescuers** Where the defendant has negligently created a situation endangering life ***or property***, he may be liable to a claimant who suffers injury as a direct result of attempting rescue." (emphasis mine)

1. In *Hyett v Great Western Railway Limited* [1948] 1 KB 345, the plaintiff was injured in his attempt to extinguish a fire. Although there was only a threat to property, not life, the Court of Appeal held that the defendant was liable. Tucker L.J., in delivering the leading judgment of the Court of Appeal, said (at p.348):

“It is material to consider the relationship of the plaintiff who intervenes in the matter to ***the property in peril*** or to the person in peril. It is relevant to consider the degree of danger and risk, and so forth. These are all matters to be weighed in the balance in applying these tests. The conclusion at which I have arrived is that, in the case of a man who is working as of right on the premises in question, it is natural to anticipate that, it he sees a fire starting on those premises where he is working, whether or not the property of his employers is in immediate peril, he, as a reasonable man, will take the necessary steps to put out the fire.” (emphasis mine)

1. On the authorities and as a matter of common sense, I am unable to accept Mr. Lim’s arguments that rescuers should feel no urge to rescue property. I find that it is reasonably foreseeable that an employee in the position of the Plaintiff would, on seeing that his employer’s property is in danger, dash forward in an attempt to save it.
2. Mr. Lim further submits that there has been so radical a departure from the Plaintiff’s pleaded case that he should be “disentitled” to success. In particular, he draws my attention to the Plaintiff’s changing the trigger of his reaction from a box to a bag, back to a box and then to I-do-not-know-what-it-was. It is true that the Plaintiff has changed his evidence fairly liberally. As I said, he is a clever man who will not think twice to change his evidence to meet challenges mounted against his case. However, I do not think there is such a radical departure from pleadings that the Plaintiff’s claim should be dismissed on technical ground. After all, natural instinct takes precedent over rational thinking process in a situation like this. Given my view that it does not matter whether the falling object was a box or a bag, as long as there was, due to the Defendant’s fault, a trigger that caused the Plaintiff to injure himself, the Defendant is answerable for that trigger and the consequential injury to the Plaintiff.
3. In this case, given the undisputed or indisputable evidence that the Defendant has done nothing to prevent objects carried in the Van from falling out from it, the Defendant has in my view failed to provide and maintain a safe system of work and that such failure has contributed to the injury to the Plaintiff.

1. In so far as the issue of contributory negligence is concerned, I must commend Mr. Lim for his fairness in not seriously arguing that the Plaintiff was contributorily negligent. After all, whatever fault that can be attributed to the Plaintiff is no more than mere inadvertence. On the question of liability, I find that the Defendant is 100% to blame.

*Injuries and Treatment*

1. The Plaintiff was born in 1964 and aged 46 at the time of the accident.
2. As a result of the accident, the Plaintiff was injured at the head. He did not seek treatment immediately after the accident and got on with his work. At around noon the same day, he started to have headache and dizziness. He then went to the A&E of United Christian Hospital for treatment. Physical examination revealed small haematoma on the left temporal occipital region. X-ray examination did not reveal any abnormality. He was given some medications and three days of sick leave. No in-patient treatment was required.

1. According to the notes of the doctors at A&E, there was no dizziness, no loss of consciousness, no vomiting and no diplopia (double vision). Glasgow coma scale was full at 15.
2. The Plaintiff continued to complain about headache and dizziness. Finally, as a result of his persistent complaints, he was referred to the Neurosurgery Department of Tuen Mun Hospital. No neurological deficit was found and the diagnosis as recorded in the medical report dated 16th June 2011 was one of “post-contusion syndrome”. Pausing here, it seems to me that “contusion” is a typo. It is a little strange that the neurosurgeon should mention a contusion. In fact, Dr. Edmund Woo in his expert report dated 4th August 2011 (at p.2) takes it to mean “post-concussional syndrome”.
3. The Plaintiff was referred to the Psychiatric Department for his complaint of low mood. He was diagnosed of dysthymia and adjustment disorder. It is the evidence of the Plaintiff that he was of good mental and physical health before the accident. However, his evidence is irreconcilable with the medical evidence. It is noted in Dr. Hung Leong Pan’s medical report dated 16th June 2011 that the Plaintiff had a history of depression for more than 10 years. A note of similar effect can also be found in the medical report of Dr. Chui Kwong Sin dated 1st June 2011. In the absence of a credible explanation for the discrepancy in evidence, I find it hard to accept his evidence that he was of good mental health prior to the accident.
4. Dr. Edmund Woo, a neurologist, examined the Plaintiff on 1st August 2011. In his report dated 4th August 2011, Dr. Woo describes the head injury as a very mild one. The residual symptoms, consisting of non-specific dizziness, depressed mood and self-assessed impaired memory, are said to be consistent with a diagnosis of a mild post-concussional syndrome. Impairment of the whole person is assessed at less than 1%. Dr. Woo also notes that the head injury has no impact on the Plaintiff’s earning capacity.

*Damages for PSLA*

1. Relying on cases like *Lam Yim Fong v Advara Investment* *Ltd.* DCPI 2084/2011, *Yeung Mei Hoi v Tam Cheuk Shing* HCPI 901/2011, *Chang Tsun Tein v Wai Lee Scaffolding Co. Ltd.* DCPI 818/2008 and *Tong Kai Wing v Cheung Wai Lun Alan, the personal representative of Cheng Pun & Another* HCPI 582/2005, Mr. Yip argues that damages for PSLA should be assessed at $150,000 to $200,000.
2. On the other hand, Mr Lim suggests that the appropriate award should be $50,000. He refers to *Chong Pui Kin v Leung Kai Fai Tony* HCPI 991/2005, *Fan Jian Hui v Chan Hak Man* DCPI 2095/2008 and *Yu Tin Sheung v Secretary for Justice* HCPI 395/2006.
3. It is obvious that not two cases are the same and the cases cited to me are are for reference only. Taking into account all the relevant factors, I assess damages at PSLA at 100,000.

*Pre-trial Loss of Earnings*

1. It is common ground that the Plaintiff earned $9,612 a month at the time of the accident.
2. The Plaintiff was granted sick leave from 10th October 2010 to 3rd January 2012, totalling 383 days. Save that he worked for some 10 days in the month of January 2011, he did not work during the entire pre-trial period. In the Statement of Damages dated 17th July 2014, a sum of $468,344.03 is claimed for pre-trial loss of earnings up to October 2014. Recognising that the claim is wholly unrealistic, Mr. Yip makes a substantial downward adjustment and claims $128,849 (being $9,612 x 383/30 x 1.05).

1. The total sick leave period of 383 days is made up of numerous shorter periods of sick leave granted by different government doctors at different clinics and a private practitioner, some of which were granted against another doctor’s advice that further medical consultation was not required. It is also of interest to note that once the Plaintiff’s claim under the Employees’ Compensation Ordinance was settled, he did not bother to attend to any further medical consultation. The overall pattern of sick leave is in my view consistent with a typical case of sick leave shopping. Notwithstanding the prolonged period of sick leave granted to the Plaintiff, it appears to me that the injury to the Plaintiff was indeed a minor one which did not prevent him from returning to work fairly shortly after the accident.

1. In *Tam Fu Yip Fip v Sincere Engineering & Trading Co. Ltd.* [2008] 5 HKLRD 210, the Court of Appeal made it clear that the court is not bound by the sick leave certificates issued by the doctors. Mr. Lim argues that the appropriate period of sick leave should not exceed three months. He draws my attention to the fact that the Plaintiff was able to report to duty on 10th January 2011 and that his supervisor did not notice any difficulty on his part in discharging his duty.

1. On the whole, I prefer the evidence of Dr. Edmund Woo that the appropriate length of sick leave should be six months. Accordingly, I assess the Plaintiff’s loss under this head at $60,556, being $9,612 x 6 months x 1.05 (the extra 5% being the Plaintiff’s loss of his employer’s contribution under the MPF scheme).

*Future Loss of Earning*

1. The Plaintiff has dropped the claim for future loss of earnings. No award will be made under this head.

*Loss of Earning Capacity*

1. I am with Mr. Lim that there is no evidence of the Plaintiff suffering any disadvantage in the labour market as a result of his head injury. Accordingly, I decline to make any award under this head.

*Special Damages*

1. The Plaintiff claims $2,385 for medical expenses and $2000 for travelling expenses. As noted above, this is a case of sick leave shopping. A few of the visits to the doctors were not necessary. I shall allow a lump sum of 3,000 for medical and travelling expenses.
2. As for the costs of tonic food, bearing in mind the Plaintiff has failed to produce any receipt and to explain to the court what made him think he needed the food in question, I am inclined to disallow the Plaintiff’s claim. However, given the Defendant’s concession that an award of $1,000 is appropriate, I allow $1,000 for tonic food.

1. The total amount recoverable this head is $4,000.

*Summary on Quantum*

1. My assessment is as follows:

(1) PSLA $100,000

(2) Pre-trial loss of earnings $60,556  
 (3) Special damages $4,000

Total: $164,556

1. Credit should be given for the EC payment of $130,000. Thus, the award, net of interest, is $34,556.

*Interest*

1. Mr. Yip fairly concedes that the EC payment of $130,000 would somehow stop interest from accruing and limits the Plaintiff’s claim for interest to interest on PSLA at the rate of 2% per annum from the date of service of the Writ of Summons. As I have not been informed of the date on which the Writ of Summons was served, I leave it to the parties to work out the amount payable as interest.

*Scale of Costs*

1. Although the final award is within the jurisdiction of the Small Claims Tribunal, it does not appear to me to be unreasonable for the Plaintiff to commence the present action in the District Court. Hence, the Plaintiff’s costs should be taxed on the District Court scale.

*Order*

1. I make the following orders:

(1) Judgment be entered against the Defendant in the sum of $34,556 with (a) interest at 2% per annum on general damages from the date of service of the Writ of Summons to the date of judgment, and (b) interest on the judgment sum (including the 2% interest on general damages) at judgment rate of 8% from the date of judgment until full satisfaction of the judgment;

(2) There be a costs order nisi that the costs of the action, including any reserved costs, be paid by the Defendant to the Plaintiff, to be taxed on the District Court scale if not agreed, with certificate for counsel;

(3) The above costs order nisi shall become absolute in the absence of an application for variation within 14 days from the date of handing down of judgment;

(4) The Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.

1. I thank Mr. Yip and Mr. Lim for their assistance throughout the trial.

(Kam K. L. Cheung)

Deputy District Judge

Mr. Richard Yip, instructed by Huen & Partners, for the Plaintiff.

Mr. Patrick Lim, instructed by John Lam, Law & Co., for the Defendant.

1. At §19 of the Defendant’s Closing Submissions. [↑](#footnote-ref-1)
2. §14 of the Closing Submissions. [↑](#footnote-ref-2)