DCPI 412/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 412 OF 2008

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BETWEEN

TAM HON WING EDDY Plaintiff

and

HOPEWILL ENGINEERING LIMITED Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 9; 10 February 2009

Date of judgment: 13 February 2009

**JUDGMENT**

1. On the basis of the injuries sustained in an accident at work in 2006, Tam (the Plaintiff) claims damages against Hopewill (the Defendant). Hopewill used to have legal representation until this January. But no witness statement at all has been filed on its behalf.
2. On the first day of the trial, a Ms Poon appeared purportedly as the authorised representative of Hopewill. As Hopewill had to comply with O.5A, r.2 of the Rules of the District Court before the court would allow a director of the company to appear, I adjourned the trial to the second day. However, by a subsequent letter, Hopewill informed the court that it would no longer send any representative to attend the trial. In the circumstances, Hopewill was effectively absent and it was up to Tam to prove his claim.

**THE ACCIDENT**

1. Tam was a 44-year-old plumber employed by Hopewill. The accident happened at the construction site of Canossa Hospital at Old Peak Road, Hong Kong on 22 February 2006. By the time of the accident, Tam had been working for Hopewill at the site for over 5 months. On the day in question, he was working with his boss, Ho, and 2 co-workers called Lam Tsai and Ho Tsai respectively. His job included installation of water pipes.
2. The accident happened inside a vertical pipe duct with room of 2.5 feet by 3 feet that ran across several floors. Photographs of the duct were produced. Tam was assigned to work inside the duct on the Ground level. Lam Tsai on the 4th level and Ho was on the 3rd level.
3. Tam stated that there was a cardboard placed by his co-worker earlier on inside the pipe duct placed to prevent objects, such as concrete chipping out of the surrounding walls, from falling down and hitting the duct. The photographs produced show what such cardboard was like inside the duct. Lam Tsai had to remove the cardboard so as to pass the tools to Ho. Apparently in the course of that, Tam was hit near his forehead by an object dropped from above him. It transpired that it was a block of concrete measuring 2 inch x 3 inch x 4 inch in dimension.
4. In court, Tam seemed to be uncertain whether the concrete block was originally on or beside the cardboard. In my view, this does not matter. Tam confirmed in court that except for their work in progress, there was no other activity across the levels among the workers inside the duct. I find that more likely than not, the concrete block fell due to such work of the workers at the time. In the absence of contradictory evidence, I accept Tam’s evidence as to how the accident happened.

**LIABILITY**

1. Tam’s case is that Hopewill failed to provide a safe system of work. Specifically, Tam has at one stage asked for safety helmet after he started working at the site. But the request has basically been ignored over the past months. In court, Tam added that in fact no safety equipment for work was provided at all.
2. Tam also explained in court that on the day in question, he and the workers originally planned to erect the entire pipe and to lower the same into the pipe duct from the top. However Ho rejected this method and instructed the workers to connect the pipe part by part inside the duct. Hence Tam was instructed to enter the duct.
3. In court, Tam was fair enough to admit that he was uncertain whether anyone had checked if there was any debris on or around the cardboard before it was removed. However, in view of the occurrence of the accident, I find that the likelihood of such inspection before removal of the cardboard was low.
4. I accept Tam’s evidence. I reject the pleaded allegations of Hopewill that it provided safety helmet and instruction. Ms Lee for Tam submitted that even assuming that Hopewill had provided safety helmet and instruction, Hopewill as the employer should still have had to take reasonable steps to ensure that the equipment was used and the instruction was followed: see *Charlesworth & Percy on Negligence* (11th ed) at 10-76 & 77. This must be right. But I need say no more in the absence of any evidence from Hopewill in that regard.
5. Tam has proved negligence and breach of implied duty of care as employer on the part of Hopewill in that it failed to provide a safe system of work.
6. I reject the pleaded allegation of contributory negligence. Tam was injured in the course of work that Ho instructed him to carry out. As he said in court, he had no choice but to do so.

**QUANTUM**

**Injuries and treatment**

1. Upon being hit near his forehead, Tam felt pain but was able to continue working for another 20 minutes. But after walking up to the 4th level, he started to faint. He remained semi-conscious on the way to the hospital. Upon arrival at the hospital, he started to feel severe pain in the head. His limbs could not move and he had difficulty breathing. This according to the diagnosis was caused by anterior cord syndrome (ACS) of the cervical spinal cord.
2. He remained in hospital for 11 days and received physiotherapy. No operative intervention was carried out. After discharge on his own request, Tam attended outpatient follow-up therapy. Sick leave has been granted until 4 December 2006.

**Present complaint**

1. Essentially Tam still complained about weakness in all limbs with the left side being more severe. There was numbness in the left upper limb and left foot. He walks with a cane.

**Medical expert opinion**

1. Tam was first examined by his expert Dr Arthur Chiang in October 2007. His report was dated 4 January 2008. Due to suspected symptom magnification in the examination, Dr Chiang called for further medical records. This led to his second report dated 19 April 2008. Tam was examined by Dr Danny Tsoi, the expert arranged on behalf of Hopewill, in August 2008. His report was dated 19 August 2008.
2. In his second report, Dr Chiang considered that both the upper limb and the right lower limb should be in satisfactory condition. Some but not marked, or possibly mild actual underlying residues would be present in the left lower limb. Dr Chiang concluded that there was symptom magnification with the alleged lower left limb weakness. Dr Tsoi concurred.
3. Based on the estimated actual underlying residues, Tam’s weakness lies with left knee and ankle weakness. But Dr Chiang assessed that Tam was unlikely in need of crutches or ankle orthosis. Dr Tsoi also came to the same view. Tam would have a reasonable capacity for a longer duration of walking and standing and in some on and off handling of light to moderate weight. There could be some decrease in the capacity for unduly prolonged walking and standing or handling of weight. Dr Tsoi had similar view and added that Tam could still enjoy his pre-accident sports such as bowling, swimming and hiking. He assessed the degree of impairment of the whole person was about 4%.
4. Dr Chiang believed that Tam might not be able to return to his pre-accident job which required heavy labour. He should be able to work as a security guard, shopkeeper, cleaner or messenger. Dr Tsoi held the same view and his list of recommended alternative jobs also included indoor decoration worker, courier, office assistant, driver, warehouse attendant and restaurant receptionist. He added that loss of earning capacity would be about 8%.
5. Dr Chiang considered that sick leave of about 1 year was required. Dr Tsoi believed the sick leave actually granted up to December 2006 (i.e. slight less than 10 months) was reasonable.

**Pain, suffering and loss of amenities**

1. Miss Lee referred to these cases as comparables: *Chui Kam Sang v Tao Kee Engineering Co Ltd*, HCPI 986/2006, 21 July 2008 (awarded HK$460,000); *Joan Carol Boivin v Wong King Yin*, HCPI 195/2001, 14 February 2001 (awarded HK$475,000); *Cheung Lee Man v Chan Wai Wing*, HCPI 760/2004, 8 March 2006 (awarded HK$325,000).
2. In the present case, I have to consider the experts’ opinion on the actual degree of impairment, pain, suffering and disability after discounting the factor of symptom magnification. These cases cited by Miss Lee are by no means close comparables but are far more serious than the present one. Miss Lee probably realised that and in her submission scaled down the amount claimed from HK$400,000 to HK$300,000. In my view, a fair award in Tam’s case should not exceed HK$250,000.

**Loss of earnings**

*Pre-accident income*

1. Tam claims he used to earn HK$10,400 a month on the basis of a daily wage of HK$400 for 26 working days. In the Form 2, Hopewill reported that Tam worked 26 days and the income of the month immediately preceding the accident was HK$10,400.
2. However, in its answers, Hopewill contended that the average monthly income was HK$10,000 which was allegedly the same in the month immediately prior to the accident, i.e. January 2006. At the same time, Hopewill calculated the average monthly income for the 8 months prior to the accident to be HK$9,022.
3. In court, Tam confirmed that the monthly certificates of payment of wages issued by Hopewill are accurate and could form the basis of deriving his actual average pre-accident monthly income. There are however only the certificates for the period between July 2005 and December 2005 prior to the accident. As mentioned above, the income for the month of January 2006 was HK$10,400 as stated in the Form 2. In my view, calculating the pre-accident average monthly income on the basis of these certificates would on balance give a more reliable result.
4. The average monthly income during the 7 months prior to the accident was HK$(8,400 + 10,400 + 10,000 + 9,400 + 9,600 +10,400 + 10,400) / 7 months = HK$9,800.

*Pre-trial loss*

1. Miss Lee accepted that in view of the medical expert evidence, Tam should have been able to resume work after the reasonable sick leave period. Sick leave expired in December 2006.
2. Tam said in court that he had tried to find a job but was unsuccessful. Miss Lee accepted that in view of the medical expert evidence, Tam should have been able to commence taking up sedentary work such as those recommended by the experts after the sick leave expired. I am prepared to allow reasonable time for Tam to be re-engaged in the workforce. After all, Dr Chiang opined that reasonable sick leave could last for about a year, i.e., until February 2007.
3. There was total loss of income since the accident until February 2007. The amount was HK$9,800 x 12 months = HK$117,600.
4. Miss Lee referred to the government statistics showing, among other things, the average income from work such as building attendant/guard and messenger/office assistant in March and June of 2007. The average monthly income ranged from HK$7,477 to HK$7,713. I take a median income level of HK$7,595 as the amount for calculation. The loss of income since March 2007 until now was HK$(9,800 – 7,595) x 23 months = HK$50,715.
5. The total pre-trial loss was HK$(117,600 + 50,715) = HK$168,315.
6. The documents show that Hopewill has paid Tam in numerous months subsequent to the accident. In the normal course of events, such would have already been taken into account when the employees’ compensation was assessed and paid.

*Future loss*

1. Tam is 47 years old now. According to the information contained in the medical expert reports, he is married living with 2 children. The elder child is adult while the younger one is only 6 to 7 years old. Miss Lee suggested a multiplier of 15. She did not submit any authority in support. In my view, this is on the high side and I think 10 should be a more reasonable multiplier in the present case. The loss will be HK$(9,800 – 7,595) x 12 x 10 = HK$264,600.

**Loss of earning capacity**

1. I have to consider whether Tam will have the difficulty in getting himself employed or staying employed as a result of his disability. It is clear from the experts’ reports that Tam’s actual impairment and residual disability are mild. There was no suggestion that Tam may be unable, or able but with reduced efficiency, to perform any particular aspect of the alternative sedentary work as recommended. There was also no suggestion that Tam is expected to need to take leave for rests more often either during the day or very now and then.
2. On established principles, I am not satisfied that Tam will be exposed to material disadvantage in the labour market when he started to take up the alternative sedentary works as recommended. Accordingly, I do not allow this item of claim. For completeness, even if I am wrong about this, the amount should at most be HK$50,000, just about half a year’s pay from such alternative job.

**Miscellaneous special damages**

1. The physiotherapy expenses at the government hospital in the sum of HK$3,500 is agreed. The travelling expenses were incurred for Tam’s wife and son to visit him when he was in the hospital as well as for his 7 sessions of outpatient treatment. Notwithstanding the lack of receipts, there is no challenge from Hopewill and I accept Tam’s evidence. I allow the amount of HK$1,644.90.
2. Miss Lee acknowledged that the controversial item is the expenses for 80 sessions of acupuncture in the Mainland in the sum of HK$26,000. This amounted to an average of HK$325 per session. There was no document evidencing the amount. Miss Lee also acknowledged that such treatment was not suggested by any of Tam’s treating doctors or the medical experts. There was also no evidence of the effect of the treatment.
3. In the absence of contrary evidence, I accept Tam’s evidence that he did receive such treatment and paid for it. On established principles that Miss Lee must have had in mind when she referred to the reasonableness of such kind of expenses, I accept that it was not unreasonable for a Chinese like Tam to decide to attempt such treatment, even in the absence of medical advice. But I find the amount to be far exceeding the range that the court would find reasonable. I allow HK$6,500 which already covers 20 sessions of such treatment.
4. The total amount of miscellaneous special damages will be HK$(3,500 + 1,644.90 + 6,500) = HK$11,644.90.

**Summary**

1. The damages to be awarded will be:

PSLA HK$250,000.00

Loss of earnings

Pre-trial HK$168,315.00

Future HK$264,600.00

Miscellaneous special damages HK$ 11,644.90

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HK$694,559.90

LESS employees’ compensation HK$164,600.00

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Total: HK$529,959.90

1. Judgment in the above sum. Interest on general damages (PSLA) runs at 2% per annum from the date of writ until today. Interest on special damages (pre-trial loss of earnings and miscellaneous special damages) runs at half judgment rate from the date of accident to today. Interest from today shall run at the judgment rate until full payment. Tam shall have the costs of this action to be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Tam’s own costs shall be taxed subject to legal aid regulations.

Simon Leung

District Judge

Miss Rebecca M K Lee instructed by Messrs Fan Wong & Tso for the Plaintiff

The Defendant, absent