#### DCPI 529/2011

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 529 OF 2011

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BETWEEN

LAM KWOK LING Plaintiff

and

LAM KWOK WING 1st Defendant

CHAN CHI KEUNG trading as

TUNG LEE ENGINEERING CO 2nd Defendant

CHINA STATE FOUNDATION

ENGINEERING LIMITED 3rd Defendant

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Before: Deputy District Judge Alfred H H Chan in Court

Dates of Hearing: 5-8 March 2012

Date of Judgment: 18 June 2013

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JUDGMENT

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*Introduction*

1. In this action the plaintiff seeks damages for personal injuries suffered by him in an accident at a construction site in Ma On Shan on 2 August 2008, caused by alleged breaches of various contractual, tortious and statutory duties. The 3rd defendant was the principal contractor of the construction site and the 2nd defendant was the main formwork subcontractor who subcontracted part of the formwork to the 1st defendant who in turn employed the plaintiff, his brother, as a formwork worker.

*Background*

1. The plaintiff was a formwork supervisor who started working on the construction site sometime in June 2008. Before then, he had been taking on small interior decoration projects as a contractor, doing mainly carpentry or tiling work, in addition to working on construction sites. On 2 August 2008 he was giving a final check to the timber formwork in preparation for the foundation of the building on the site and to make rectifications to the formwork where necessary, to make sure that the timber moulds were fit and ready for the pouring of concrete that afternoon, as the pouring of concrete was about to take place. The timber moulds were stabilised by twisted metal wires attached at one end to the moulds about 1 metre above the ground, and at the other end near to the ground either to a hole in a steel plate welded to an I-beam underneath, or to metal pipes driven into the ground. While moving from mould to mould in performing his duty, the plaintiff was caught by one of the metal wires, lost his balance and fell. I will deal with the evidence of how he was “caught” by the wire later in this judgment. During the fall, the plaintiff held out his right arm trying to support himself and landed on his right hand, fracturing his right wrist.

*Issues*

1. Both liability (including contributory negligence) and quantum were in issue. The plaintiff’s case is that the metal wire in question was a safety hazard, as evidenced by the remedial action taken by the 3rd defendant’s safety officer by wrapping a red and white warning tape round the wire after the accident. The fact that the plaintiff was in a hurry to finish up the formwork also did not help. The defendants’ case is that the metal wires were twisted wires, silver in colour, 4 to 5 mm in diameter, and were clearly visible. The accident, the defendants say, was caused by the plaintiff’s own failure to keep a proper look-out for where he was going and the defendants should not be liable for the accident. Even if they were liable, the plaintiff himself contributed to the accident.
2. In relation to quantum, the main dispute is whether the plaintiff is fit to return to his pre-accident duties as a formwork supervisor or interior decorator. The defendants maintain that the plaintiff is fit, and he has exaggerated his present disabilities. The plaintiff maintains that he is not fit to do so, and his condition has been complicated by the De Quervain syndrome.

*EVIDENCE*

*The plaintiff’s evidence*

1. The plaintiff made a witness statement dated 24 August 2011 which he adopted as his evidence-in-chief. He was born on 18 May 1964. He started working at the age of 16 and did various jobs, including working as a hairdresser for 5 years. After that, he entered the construction industry as an apprentice carpenter and later became a master. As early as 2006, he began working for his brother the 1st defendant on and off at different construction sites. At the end of May 2008, he was asked by the 1st defendant to work as a formwork worker at the Villa Oceania construction site at Ma On Shan, the site in question, earning a daily wage of $700. Since he was familiar with formwork installation, he was responsible for supervising and teaching other workers in carrying out their formwork duties. He would also check the condition of the formwork, and fix any damaged or ruptured timber moulds.
2. The accident occurred at about 1:45 pm on 2 August 2008. The plaintiff was checking and fixing the timber moulds. At the site, there were many structural steel bars “criss-crossing” from the concrete ground. There were metal wires at the site which were used to hold the formwork in place. The site was very messy. The plaintiff was walking past a pile cap near which there was a metal bar protruding from the ground and where the wires were criss-crossed. He tripped, lost his balance and dived forward. Instinctively he held out his right arm to support himself and he landed on his right hand. Then his head hit the ground, and although he was wearing a safety helmet, he passed out for about 10 seconds. When he came to, his right wrist felt very painful. A worker nearby went up to him immediately to ask how he was. The plaintiff saw that his wrist was only slightly swollen, and reckoned that he was fine and got up at once. He took a brief rest and continued to work. But the pain in his right wrist got worse and worse. His brother the 1st defendant realised that something was amiss. After learning what had happened, the 1st defendant told the plaintiff to seek treatment at a hospital emergency department. The plaintiff then went to Yan Chai Hospital.
3. Details of his treatment are contained in the medical reports which I will deal with later in this judgment. The plaintiff also confirmed the accuracy of his loss stated in the Revised Statement of Damages. As to his present condition, he claims that he is still suffering from limited movement and stiffness of the wrist. When he tries to hold his fist together or grip something in his right hand, he will get a spasm in his right thumb and index finger. Since his right hand cannot carry too much weight, he no longer dares carry heavy objects. Before the accident, he used to play badminton and football with his friends 5 to 6 times a month. Although he did try to play badminton after the accident as recommended by the doctors, the pain afterwards was such that he had to stop playing his favourite sports. After the sick leave period, he did try to work as a light duty casual worker at construction sites. Later he found jobs with a construction companies but had to quit as he could not cope with the physical demands of the jobs. In mid-November 2010 he found work as a part-time hairdresser and in late April 2011 started working at a different hair salon as a full-time hairdresser. When questioned by his counsel, he added that since late September 2011, he started working at yet another hair salon, though earning the same monthly salary as before. After his injury, he had lost all confidence in doing construction site work.
4. Under cross-examination by Mr Lim for the defendants, he disagreed with Mr Lim’s suggestion that as a worker with supervising duties, his manual duties were lighter than the normal formwork workers. He explained that he still had to do the actual formwork himself, in addition to demonstrating to the other workers how to do it and fixing any damaged formwork.
5. He disagreed with the suggestion that based on the parties’ joint medical report, he was not trying his best when undergoing the hand grip test, and that he was in fact fit to go back to work as a formwork worker. He also explained that before the accident, he was able to fill up his work calendar by switching between his small decoration projects and working on construction sites without gaps in between because the construction companies he worked for were run by family members or relatives which gave him the flexibility to alternate between the two kinds of work.
6. As to the accident itself, he was shown Exhibit D2 which was an example of a metal wire with 3 strands of wires twisted together to form a single wire. He agreed that the metal wire that tripped him was a twisted wire, of similar thickness, but added that it was only a pair of wires (and not 3) being twisted together. He was shown Exhibit D1A which is a colour photograph taken by the safety officer taken at 4:41 pm after the accident. It shows a metal wire attached at one end to a piece of steel plate near the ground and at the other to a timber mould at a certain height, so that the wire was at an angle to the ground. The plaintiff said that he was not tripped by that particular wire shown in D1A but agreed that this was one example of the metal wires used to secure the formwork. He added that some metal wires were attached to metal pipes piled into the ground, wound round the pipes with the “scattered” or loose ends exposed. It was these exposed loose ends of a metal wire of this type of attachment which “hooked” or caught the bottom of a leg of his jean trousers which made him fall. When after the fall he looked back he could see that the loose ends were at an angle to the ground, about 5 inches above ground level. He could also see that the metal wire had left a hole on the bottom of one of the legs of his trousers. Before his fall, he could not see those loose ends of the wire in the heat of a 33˚C day, but he was fully aware of the main wire itself which he had already avoided. Although the project was in a rush, he was walking at a normal pace. He agreed that he would have been walking very close to the loose ends, as he had no choice because at the site there were many steel bars blocking the way and there were other objects on the ground. The way he took was the only access left for where he wanted to go, which was a small narrow path.
7. He agreed that he did not mention in his witness statement the fact that his trousers were caught by the loose ends of a wire, but said that he did mention it to the safety officer when a statement was taken from him within a week of the accident. There was some confusion as to whether he mentioned it to the person who took the witness statement from him for the purpose of this action, but in the end he said he did. He did not agree that the account he gave in paragraph 6 of his witness statement was different from his evidence, but said the witness statement was 80% correct. At the time, he did not think that this detail was so serious. He disagreed with the suggestion by counsel that he was not looking where he was going and that he just slipped and fell.
8. In re-examination he maintained that what was said in paragraph 6 of his witness statement was true; what was missing was the fact that his trousers were caught by the loose ends of a wire. He explained that the accident occurred not at the location shown in D1A but somewhere over to the left of what is shown in D1A. The project was in a rush because he only had half an hour to finish the inspection and rectification of the formwork, as the concrete had already arrived on site. He was interviewed by the safety officer a few days after the accident and signed a statement. He told the safety officer the details of the accident including the fact that his trousers were “hooked” or caught by a wire. When he pointed out to the safety officer that that detail was not in the statement, he was told that it was just a formality to be submitted to his superiors to fulfil the officer’s duty, and the most important thing was that the accident was caused by the wire.

*The safety officer’s evidence*

1. Chan Hon Keung (“Chan”) was the 3rd defendant’s safety officer at the site. He was informed by the 1st defendant about the accident about 1½ hours later, and about the approximate location of the accident. He took the photographs which are now Exhibits D1A to D1D. He interviewed the plaintiff on 5 August 2008, and it was after the interview that he prepared the Accident Report. The plaintiff had not mentioned to him that the accident was caused by the loose ends of a wire catching the plaintiff’s trousers.
2. In cross-examination by Mr Clough for the plaintiff, Chan said that the 1st defendant telephoned him between 3 and 4 pm, but he did not make a record of what he was told by the 1st defendant, or when he received the report. The correct procedure was for an accident to be reported immediately, not 1½ hours later. He could not be sure whether it was really an accident, or whether it really happened on site. The 1st defendant told him that it was probably not a very serious accident, just that there was a fall and where the approximate location was, ie somewhere around the pile cap – which was the whole area of the podium of the building being built. He agreed that the first time he made any record of the incident was when he interviewed the plaintiff. It was when Mr Clough asked where the record of interview was that Chan said that he had a copy with him. It transpired that not only was there a signed statement from the plaintiff dated 5 August 2008, but there was also one from a fellow-worker Cheung Kit Lam on the same day, neither of which had ever been disclosed. As a result, Chan’s examination-in-chief was re-opened and he gave evidence that the statement given by the plaintiff dated 5 August 2008 was an accurate record of what he was told by the plaintiff. It was as a result of the interview, in which the plaintiff mentioned that another worker Cheung Kit Lam witnessed the accident, that he contacted and interviewed Cheung on the same day.
3. When cross-examined again, Chan said that he thought that there was a doubt about the alleged incident, because it was not reported to him immediately and he did not understand why the plaintiff went to Yan Chai Hospital and not Prince of Wales Hospital which was nearer the site. Therefore he did not make a record of the report by 1st defendant. He tried in vain to get in touch with the plaintiff on the day of the accident. The following day he saw the plaintiff back on the site with his wrist in a plaster cast. He had been told that the injury was not so serious. Had the injury truly been so serious, there was no reason he was not told immediately after the accident. Back in 2008, the construction industry was going through a bad patch, and many workers faked injuries in order to receive compensation. As a result, he had a suspicion about the incident. He chose not to speak to the plaintiff yet because he wanted to find out if the accident really occurred on site. It was only after he spoke to a registered engineer on site who had seen the plaintiff after the latter’s fall that he was satisfied that the accident did occur on site and proceeded to arrange an interview with the plaintiff.
4. He agreed that during the interview the plaintiff complained about the pain in his wrist, and that when the plaintiff mentioned the length of time the interview was taking, he told the plaintiff that it was a necessary formality. He agreed that the plaintiff told him that the plaintiff tripped and fell, but disagreed that the plaintiff explained that his jeans got caught by the wire ends. He also disagreed that in taking the statement he was trying to minimise the 3rd defendant’s responsibility. Since the accident, he has adopted the practice of putting warning tapes round the metal wires. He also accepted that the formwork subcontractors were put under a time constraint because the concrete was already waiting to be poured, and therefore recommended in the Accident Report that the management should allow workers enough time to finish their jobs.

*Yau Wan Keung*

1. The defendants’ only other witness was Yau Wan Keung who was a foreman of the 2nd defendant. He did not witness the accident but was told by the plaintiff on the day of the accident that he had suffered a fall. Yau told the plaintiff to see a doctor. He went to look at the wire which was supposed to have tripped the plaintiff and noted that it was a twisted wire, silver in colour, 4 to 5 mm in diameter. He had a discussion with Chan the safety officer on the day of the accident about the location of the accident, the type of injury and so on.

*The plaintiff recalled*

1. As a result of the new evidence of the statements taken by Chan, the plaintiff was recalled. He said the interview on 5 August 2008 took about 2 hours and as he was in pain, he asked if Chan could finish the interview as quickly as possible. He did tell Chan that he tripped and fell, but he also told Chan that his trousers were caught by the wire. When he saw the draft statement which did not refer to that detail, he asked Chan about it who told him that it was just a formality and the draft would do. In cross-examination, he agreed that that was the only correction he suggested to Chan. When then asked about his last answer in the statement to the effect that he had failed to notice the wire and had been careless in tripping over the wire, he denied having said so to Chan.

*Injuries and treatment*

1. The plaintiff consulted the Accident and Emergency Department of Yan Chai Hospital on 2 August 2008 with swelling and tenderness over the right wrist, and was diagnosed with a fracture of the right distal radius. His right wrist was set in a plaster cast which was taken off on 28 August 2008. He was given physiotherapy treatment at the end of which he still complained of residual pain over the right thumb, which was a complication related to the fracture. Since there was no further improvement, he was referred to the Department of Orthopaedics and Traumatology. In the meantime, between January and September 2009, he consulted private doctors including Dr Kwok Kin Wa and Dr Wong Pit See (the latter by virtue of a referral by the insurance company). Dr Kwok Kin Wa noted that he was told that sometime after the cast was taken off, it was recommended to the plaintiff that he should resume light duties. Dr Wong also noted that the plaintiff tried to resume work a few times in February 2009 but was unable to perform his duties due to the wrist pain and weakness. The plaintiff also said that he became depressed, as a result of which he was referred to a specialist in psychiatry Dr Lam Tat Chung whom the plaintiff consulted on 8 occasions. On 12 October 2009, he attended the Department of Orthopaedics and Traumatology at North District Hospital. He was diagnosed with De Quervain tenosynovitis, or the De Quervain syndrome. He was given analgesics and occupational therapy treatment from 18 November 2009 to 5 January 2010 by way of a working splint which he wore in the daytime. At the end of the occupational therapy, he showed a slight improvement in the pain level and the hand grip strength. He refused the option of steroid injection for his residual pain.

*Joint medical report*

1. A joint medical report dated 29 August 2010 (“the joint report”) was prepared by Dr Tio Man Kwun Peter and Dr Chiang Si Chung Arthur after their examination of the plaintiff on 12 July 2010. The doctors agreed that the fracture was compatible with falling on his outstretched right hand. There were signs suggestive of De Quervain’s syndrome since October 2008.
2. On their own physical examination, the doctors noticed localised tenderness over the right wrist, positive Finkelstein’s test suggestive of De Quervain’s syndrome, weakness of right hand grip and reduced ranges of motion. They also agreed that the plaintiff exhibited a “sub-maximal effort” in the hand grip test as the distribution of data for the right wrist was not in a bell shape curve compared with that for the left. There was no muscle wasting signifying that he did not have much disuse of his right upper limb.
3. Dr Chiang noted that the actual readings for the right wrist in the hand grip test were low or very low for the dominant right hand of a manual worker, even taking into consideration De Quervain’s syndrome. Therefore the true residual problem could be much less than as described by the plaintiff. Dr Tio was of the opinion that due to the close proximity in time of the onset of symptoms to the fracture, the syndrome was the result of the fracture. Dr Chiang added that most cases of the syndrome would respond to oral anti-inflammatory drugs, a period of rest, one or several injections of a steroid preparation and splintage. In occasional cases when pain persists, surgery with release of the overreactive thickening of the fibrous flexor sheath (which causes the syndrome) is the treatment of choice. To that extent Dr Tio agreed, suggesting that one or two steroid injections should be considered (which the plaintiff had previously refused), and a surgical decompression has a success rate of over 80%. Dr Chiang finally added that with the prolonged resting of the wrist over the sick leave period, the satisfactory improvement or resolution of the syndrome had likely been achieved. Dr Tio was of the opinion that the plaintiff would have a reduced efficiency as a construction site worker especially when using a hammer or other instruments as a formwork worker but should be able to resume lighter duties. Dr Chiang was of the opinion that the plaintiff should be able to return to his pre-injury work. Both doctors agreed that the prognosis was good for the right wrist fracture.
4. Dr Chiang assessed the permanent impairment of the whole person and also loss of earning capacity at 1%, while Dr Tio assessed the same at 2.5%.

*How the accident occurred*

1. Although there was initial doubt on the part of Chan the safety officer as to whether there was an accident, and if so whether it occurred on site, it is now not in dispute that the plaintiff did suffer a fall resulting in a fractured wrist. The two doctors responsible for the joint report also agree that the injury was consistent with the way in which the plaintiff has described he landed. Still in issue is what triggered the fall and who was responsible for it.
2. There were no other witnesses to the actual fall. The statement of a fellow-worker Cheung Kit Lam (Exhibit D5) taken by Chan does not help in this regard since he only saw the plaintiff after the fall. In any event, given the last-minute introduction of D5 into the evidence and the lack of opportunity to cross-examine Cheung, I place no weight on this statement. In the statement the plaintiff made to Chan dated 5 August 2008 (Exhibit D4), he is recorded as having said that he failed to notice a wire supporting the formwork, was tripped by it and lost his balance. This account was reproduced in Chan’s Accident Report, which was later attached to Form 2, the Notice by Employer of an Accident to an Employee dated 15 August 2008. In paragraph 7.2 of the Statement of Claim, it was pleaded that the plaintiff “tripped over one of the metal wires and fell forward.” In paragraph 6 of his witness statement, he said “since there was a metal bar protruding from underground, and the wires were criss-crossed, I tripped and lost my balance and dived forward.”
3. The account that the loose ends of a metal wire caught the plaintiff’s trousers never appeared on any documents leading to the trial, until the plaintiff proffered this detail during his cross-examination. The plaintiff said he had mentioned it to Chan during the interview, and to the statement-taker who prepared his witness statement. While I have misgivings about Chan’s attitude (even against the background of fake injury claims by some construction site workers in 2008) in deciding not to make any record of the report of the accident because it had not been reported to him immediately and until he was satisfied that there had been a genuine accident which had occurred on site, I do not accept that he had omitted this detail from the statement either because he thought the statement was a mere formality and it was an unimportant detail, or because he wanted to minimise the 3rd defendant’s responsibility. In the Accident Report prepared by him, while he put the plaintiff’s failure to notice the metal wire as the main cause of the accident, he also included the limited space or access on site for the worker and the time pressure for the completion of the formwork as secondary causes of the accident, which are at least potential grounds of liability on the part of the 3rd defendant. He also recommended as remedial action the putting of warning tapes over the metal wires and the better scheduling by the management of stages of construction work to give enough time to contractors to complete their tasks. All in all, I do not regard the Accident Report as an exercise in minimising the 3rd defendant’s liability.
4. I also find it unlikely that if the plaintiff had mentioned this detail to his own solicitors, it would have failed to find its way into the witness statement. It was clear by that stage that the defendants were maintaining that the metal wire was conspicuous and that the plaintiff’s failure to notice the wire caused or contributed to the accident. The detail, that the fall was caused by the loose ends of a wire protruding from close to the ground catching the plaintiff’s trousers would or at least might have a bearing on the issue of liability or the share of responsibility.
5. I therefore do not accept that the accident was caused by the plaintiff’s trousers being caught by the loose ends of a metal wire, and find that the accident occurred as a result of one of the plaintiff’s legs tripping over a metal wire as depicted in Exhibit D1A (whether or not the wire in D1A was the very wire that tripped the plaintiff), as previously explained by the plaintiff in his statement to Chan and in his witness statement.

*Liability*

1. While there was disagreement over the number of strands making up the twisted wire in question, there is no real dispute about the thickness of the wire, as the plaintiff accepted in evidence that the wires at site were similar in thickness to the sample produced at trial, which is about 4 to 5 mm in diameter. I find that the wire which caused the accident was visible and noticeable.
2. Mr Lim submits that the plaintiff must have failed to notice the metal wire, as he so admitted in Exhibit D4. Mr Lim argues that since the plaintiff has disowned the version of events that one of his legs tripped over a metal wire, and the plaintiff being the only witness who could give evidence on that version of events, there is no evidence to show why he had failed to notice the wire. Therefore, he submits, it cannot be established, the burden being on the plaintiff, that the lack of warning of the presence of the wire caused the accident.
3. But before one considers the effect of the absence of warning on any of the metal wires, one ought to consider the significance of the presence of the metal wires on site. Neither party has adduced any evidence as to whether there were alternative methods of stabilising formwork without having these metal wires lying across the paths of workers who had to move around the site, and so for the purpose of this case only, I would proceed on the basis that the wires had to be there for the formwork, as Mr Lim puts it. In my view the metal wires posed a foreseeable risk of tripping and as a result it was incumbent upon the defendants to give appropriate warnings to workers exposed to that risk about the potential danger. There is no dispute that at the material time, there were no warning tapes wound over the metal wires, as was done after the accident. Mr Lim argues that the lack of warning by itself does not establish a causal connection to the accident. The plaintiff may have been distracted and was not looking where he was going, in which case a warning tape would not have prevented the accident. I do not accept that submission. The purpose of a warning is to generate or heighten alert to a potential danger. It is there to attract the attention of someone who may not otherwise notice or remember the danger, or to increase his attention if he is already aware of the danger. Workers may be aware of a particular hazard generally, as the plaintiff was aware of the presence of the metal wires, but experience has informed us that workers do fall prey even to hazards with which they are well familiar. Appropriate warnings act as reminders to them of these hazards.
4. It is true that the plaintiff said in cross-examination that the accident was not caused by one of his legs tripping over a wire, and I have found against him in this respect. That does not mean, however, that his evidence about the circumstances leading up to the accident should be ignored. His evidence that he had been under a time constraint to finish his inspection and rectification of the formwork because the concrete was waiting to be poured finds support in a contemporaneous account he gave to Chan on 5 August 2008. His account that his access on site to the formwork moulds was limited and strewn with objects on the way is also reflected in the Accident Report prepared by Chan and annexed to Form 2. The absence of warning tapes wound over the wires is not in dispute. I find that these were the conditions and environment under which the plaintiff was operating when carrying out his final inspection of the formwork at the time of the accident. He had to rush to finish his job while having to negotiate his way through objects or obstacles in his way. It was in these circumstances that he failed to notice the wire which was in his way, which I find was caused by the need to finish his job in the limited time allowed, in an environment of limited space for access, and in the absence of warning. The defendants were under a duty of care towards the plaintiff to provide a safe working environment and a safe system of work and they failed in this duty. Such failure had a causal connection with the occurrence of the accident.

*Contributory negligence*

1. There is no doubt that the metal wire was noticeable and that the plaintiff should have been able to notice it. Given the fall, and in the absence of any explanation from him (other than the version that his trousers were caught by the loose ends of a wire, a version I have rejected), the natural inference is that he failed to notice the wire. He also admitted to such failure to Chan in Exhibit D4. Such failure contributed to the accident and the injury he suffered occurred as a result partly of his own fault. In coming to this conclusion, I do not put any weight on his apparent admission of “carelessness” in his statement to Chan. It is not uncommon for workers to feel “responsible” simply because an accident has occurred. Whether he contributed to the accident is a matter for the court based on findings of the acts and omissions of the parties concerned, not on the plaintiff’s subjective feelings of guilt or regret, or his own view as to whether he had been “careless”.
2. As to the plaintiff’s share of responsibility, Mr Lim has helpfully referred me to *Boothman v British Northrop Ltd* (1972) 13 KIR 112 (tripping over a cable), *McMillan v Lord Advocate* (1991) LT 150 (tripping over a threshold) and *Lai Wai Tan Peter v Secretary for Justice* (unrep) DCPI 1469 of 2006, HH Judge Leung, 9 October 2007 (slipping and falling on a wet floor), which provide useful indications of previous assessments by the courts, although each case must be decided on its own facts. In this case, I find that the main cause of the accident was the conditions and environment under which the plaintiff had to operate (see paragraph 32 above), and the plaintiff’s failure to notice the wire was itself partly the result of those working conditions and environment. My estimate of his share of responsibility is 25%.

*QUANTUM*

*Ability to return to pre-accident work*

1. At the forefront of the dispute between the parties over quantum is whether the plaintiff is capable of returning to his pre-accident work as a formwork worker and interior decorator (doing mainly carpentry work). Mr Lim submits that the plaintiff has exaggerated his present disabilities, as shown by his use of sub-maximal effort in the grip test conducted by the two doctors who prepared the joint report, and Dr Chiang’s opinion that the plaintiff is able to return to his previous duties. Mr Lim also submits that the finding of the absence of muscle wasting, as agreed by both doctors, is a good objective indication of the recovery of function, an indicator also relied on by Bharwaney J in *Hung Sau Fung v Lai Ping Wai* (unrep) HCPI 204/2009, 7 October 2011. The absence of muscle wasting was also noted by Dr Wong Pit See in his report dated 3 September 2009. Mr Lim has also questioned the credibility of the plaintiff, referring to the new version of the accident which the plaintiff gave in cross-examination. Mr Clough argues that unfortunately people are open to the temptation of exaggeration including the plaintiff, but the best indication that the plaintiff’s present complaints are genuine is his willingness to return to work. Mr Clough also points out that it was the plaintiff who first volunteered the information that had had given a signed statement to Chan which would otherwise not have been disclosed, and that it was a good indication of the plaintiff’s openness and frankness.
2. The plaintiff has given evidence that he tried to go back to his previous work on construction sites or working for decoration companies in February 2009 but the condition of his wrist was such that he could not cope with the physical demands of the jobs. It should be noted that it had been recommended that he could return to work by the doctors, as recorded by Dr Kwok Kin Wa in paragraph 2 of his report. Furthermore, Dr Wong Pit See, a private doctor who examined the plaintiff in March, July and September 2009 upon the referral of the insurance company, also noted down the plaintiff’s report of his attempt to return to work in February 2009 and his inability to cope. I accept his evidence that he did try to return to work but was not up to it. His inability to cope with his pre-accident work in February 2009 is in my view supported by the subsequent diagnosis by the Department of Orthopaedics and Traumatology at the North District Hospital in October 2009, a diagnosis consistent with the positive result of the Finkelstein test (a test for the diagnosis of the De Quervain syndrome) conducted by Dr Kwok Kin Wa as early as late January 2009: see his referral letters dated 22 January and 5 February 2009. It is also supported by the evidence of private treatment which he found necessary, before the appointment with the North District Hospital came up in October 2009. He was given occupational therapy, including the wearing of a working splint, between 18 November 2009 and 5 January 2010. Comparison between the initial assessment (when he first received occupational therapy) and the final assessment at the end of the treatment shows an improvement of his condition, albeit small.
3. As to the cause of the syndrome, Dr Chiang gave the opinion that it could arise from overuse of the thumb or could develop in association with the fracture. However, there is no evidence of overuse in this case. In any event, the symptoms had already appeared by the time the plaintiff consulted Dr Kwok Kin Wa in late January 2009, which was before the plaintiff attempted to return to his pre-accident work, so that the onset of symptoms cannot be attributed to the return to work. Nor can the plaintiff be faulted for attempting to do so when the return to work had been recommended to him. Therefore I prefer the opinion of Dr Tio in this regard that the syndrome was associated with the fracture itself by virtue of the close proximity in time with the onset of symptoms, and a result of the accident.
4. Up to the end of the occupational therapy, I can see no evidence of feigned or exaggerated symptoms. His residual complaints about pain in the wrist, the treatment and the progress are well documented. I accept that although the fracture itself healed satisfactorily, the plaintiff was still genuinely suffering from residual pain even after the end of the occupational therapy, as a result of the De Quervain syndrome.
5. The question remains whether by the time of the joint examination on 12 July 2010 and by the time of the trial, the plaintiff was still suffering from residual pain in his wrist.
6. I accept that the plaintiff used sub-maximal effort when he took the right hand grip test for the purpose of the joint report, a matter upon which both doctors agreed. I have also rejected his evidence that his trousers were caught by the loose ends of a wire, a version of the accident which came to light for the first time only in the middle of his cross-examination. However, other than these two matters, the history of events does not show a tendency on his part to feign or exaggerate his injury or to bolster his potential claim for compensation. His reaction immediately after the accident was that it was not a serious injury, and he tried to continue to work, although that quickly proved to be impossible and he was told to seek treatment. In his interview with Chan, the plaintiff frankly admitted that he failed to notice the wire, and thought he had been careless. The fracture healed, and the physiotherapy made an improvement on his condition, but some pain remained and the progress stalled. In February 2009 he attempted in vain to return to work and it was only in October 2009 when the medical appointment came up that he was diagnosed as suffering from the De Quervain syndrome.
7. Moreover, the plaintiff finally started working as a hairdresser in November 2010, an old occupation of the plaintiff’s before he became a master carpenter, and has remained a hairdresser since then, earning much lower wages at hair salons where tips are not expected.
8. My view of the plaintiff is that he is hard-working and responsible, proud of his trade and keen to achieve what is expected of him as an experienced carpenter or formwork worker, just as he tried to finish the formwork inspection in the limited time available to him, insisted on resuming work even after the accident, attempted to return to the construction field in February 2009 after he was told he could, and finally in November 2010, picked up his old skills as a hairdresser to earn a living. In his evidence, the plaintiff said that he had lost all confidence in his job as a carpenter, due to the constraints caused by the pain and spasms in his wrist, which made him drop his tools. This is hardly surprising, as construction work in Hong Kong progresses at a certain pace and no construction worker would like to find himself to be considered by his colleagues or employers to be a hindrance to the progress of the work, especially when the plaintiff was experienced enough to be given the task of demonstrating to other workers how the formwork was to be carried out.
9. The joint medical examination took place in July 2010, at a time when the writ had been issued and liability was being denied. Chan the safety officer has given evidence of his sense of distrust about reports of industrial accidents on construction sites in 2008 when the industry was going through a bad patch, and that sense of distrust pervaded his “investigation” of the accident. I am not in a position to say whether that sense of distrust had filtered through to the plaintiff, but the plaintiff did give evidence that after the end of his sick leave, his brother the 1st defendant offered him a job in a drainage project at a site in Sau Mau Ping but 2 days later told him that he could not work there because the 3rd defendant was also the main contractor and as he was still claiming compensation from the defendants, he had been blacklisted. The blacklisting was denied on behalf of the 3rd defendant, and for the record, I make no finding about such alleged blacklisting, but I accept that this was what the plaintiff thought happened.
10. The plaintiff has no doubt done himself a disservice by using sub-maximal effort in the grip test, and by relating in his evidence a different version of how the accident occurred which might have reduced his own fault. However, given the history of events as I related above, it is in my view likely that he has done so out of a misplaced desire to prove that his was a rightful and genuine claim which was being, as he perceived it, unjustly denied by the defendants, and as a result of which claim he thought he had been blacklisted from working on the 3rd defendant’s projects. For these reasons, and having seen and heard the plaintiff give evidence, and having regard to the history of events, including his willingness to return to work, I am satisfied that he genuinely believed he was still suffering from the residual pain that he complained about, and was not a malingerer, despite the matters which have been ably urged upon me by Mr Lim. I also accept that he has lost confidence in his pre-accident work. His attempt to return to construction work may, with the benefit of hindsight, have been premature, but he did so on recommendation and it was only later in October 2009 that he was diagnosed with the De Quervain syndrome, when his appointment at the North District Hospital finally came up, even though the symptoms had likely surfaced by late January 2009 when he consulted Dr Kwok Kin Wa, or earlier. This loss of confidence was due to his premature return to work and was a result of the accident.
11. For these reasons, I prefer the opinion of Dr Tio, who was aware of the use of sub-maximal effort by the plaintiff and the absence of muscle wasting, in the joint report, that the plaintiff will have a reduced efficiency in resuming his heavy manual duties as a construction worker but should be able to take up lighter duties such as those of a garbage collector, a painter or other light duties for interior decoration. I also find, due to the loss of confidence suffered by the plaintiff, that he will not be able to return to his pre-accident carpentry work whether on construction sites or in interior decoration projects.

*PSLA*

1. The plaintiff was aged 44 at the time of the accident and suffered a fracture of the right wrist which was treated by a plaster cast. Although the fracture itself healed well, the plaintiff developed as a result of the fracture the De Quervain syndrome which showed some improvement after treatment but the plaintiff still suffers from residual pain in his wrist, limiting his ability to use heavy implements and to play badminton which used to be his favourite sport. But the residual pain will not affect his daily living activities or his ability to perform household chores. I have been referred to comparable cases on PSLA by both counsel and I find the present case within the range of *Mehmood Khalid v Million Harvest Wharves & Logistics Limited* (unrep) HCPI 401/2006, 20 June 2007, Saunders J; *Tang Shu Shek v Leung Chi Kit* (unrep) HCPI 219/2002, 13 May 2004, Master Levy; *Tang Bo Ling v Chan Po* (unrep) DCPI 79/2007, 20 August 2008, HH Judge HC Wong. An award of $180,000 is appropriate.

*Loss of earnings*

1. I accept the plaintiff’s evidence that he used to work both on construction sites and on his own interior decoration projects due to his family connections with construction companies or employers, which would have earned him more than working only on construction sites, and that he would have been able to obtain a full month of employment and contract work every month but for the accident. However, due to the lack of records of his decoration earnings, the plaintiff has presented his claim on loss of earnings based on his income of $18,340 in the month of July 2008 (the only full month before the accident in which he worked solely for the 1st defendant). Mr Lim submits that since the plaintiff generally worked more as an interior decoration contractor than on construction sites before the accident, he should not be entitled to MPF contributions. I do not agree. As the plaintiff’s claim is based on the lower income as a full-time construction site employee, any award based on such a claim must carry with it the normal MPF payments for a full-time employee.

*Pre-trial loss of earnings*

1. I accept the plaintiff’s evidence that he was not able to return to his pre-accident work, and of his attempts to return to work after the accident and the income he made therefrom, the particulars of which are in the Revised Statement of Damages. He is currently earning $8,500 a month as a hairdresser. I would therefore make an award of pre-trial loss of earnings in line with paragraphs 8(i) to 8(vii) of the Revised Statement of Damages up to late April 2011, in the sum of $365,883 (sick leave period since the accident up to end of February 2010) + $50,211 (March to late May 2010) + $12,475.5 (late May to mid-July 2010) + $66,948 (mid-July 2010 to mid-November 2010) + $97,870.5 (mid-November 2010 to late April 2011), and thereafter the plaintiff has been earning $8,500 per month as a full-time hairdresser from late April 2011 up to the date hereof for 25 ½ months and his partial loss of earnings for that period is ($18,340 – $8,500) x 25.5 x 1.05 = $263,466. The total pre-trial loss of earnings is $856,854.

*Loss of future earnings*

1. The plaintiff is now aged 49. I consider a multiplier of 5 appropriate for someone in the occupation of a construction site worker with heavy manual duties. Loss of future earnings is ($18,340 – $8,500) x 12 x 5 x 1.05 = $619,920.

*Other special damages*

1. The amount of other special damages at $13,550 is not contested.

*Total Award*

1. The total award is calculated as follows:-

PSLA $180,000

Pre-trial loss of earnings 856,854

Loss of future earnings 619,920

Other special damages 13,550

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

1,670,324

Less: 25% contributory negligence (417,581)

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

1,252,743

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

Less ECC payment (318,740)

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

$934,003

*Orders*

1. The orders I make are as follows:
2. that there be judgment for the plaintiff in the sum of $934,003.00;
3. that there be interest on the award of PSLA at 2% per annum from the date of service of the writ to the date of judgment, and interest on pre-trial special damages at half the judgment rate from the date of the accident (2 August 2008) to the date of ECC payment, and on the remaining balance at the same rate from the date of ECC payment to the date of judgment, and thereafter at the judgment rate until payment; and
4. that there be a costs order nisi that the defendants do pay the plaintiff’s costs of this action, with certificate for counsel, to be taxed if not agreed.

(Alfred H H Chan)

Deputy District Judge

Mr Neal Clough, instructed by B Mak & Co, for the plaintiff

Mr Patrick Lim, instructed by Wan & Leung, for the defendants