## DCPI 865/2007

IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 865 OF 2007

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##### BETWEEN

NG KA CHUK Plaintiff

### and

WELCOME CONSTRUCTION CO. LTD. 1st Defendant

BOSS IT CONSULTANCY LTD.

(Formerly known as HOPSFIELD

INTERNATIONAL LTD.) 2nd Defendant

TOP EXPRESS ENGINEERING LTD. 3rd Defendant

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Coram: Deputy District Judge A. Yuen in Court

Date of Hearing: 24th to 25th July 2007

Date of Handing Down Judgment: 16th August 2007

JUDGMENT

1. The Plaintiff bought an action against the Defendants for damages in respect of personal injuries sustained by him when he was working in a construction site at Victoria Road, Hong Kong (The Site).
2. The 1st Defendant was the main contractor of the Site; the 3rd Defendant was the subcontractor of the 1st Defendant while the 2nd Defendant was subcontractor of the 3rd Defendant. The Plaintiff was employed by the 2nd Defendant as a driver as well as a worker.

The Accident

1. The Plaintiff testified that on 7 October 2003, he was working in the Site. The construction work involved the laying down of a 15-meter long water pipe underneath the pavement of a section of Victoria Road. Workers had to dig a ditch of about 1 meter deep; 0.8 meter wide and 15 meter long. The Plaintiff was required to assist in conveying the excavated earth and debris from the ditch to a dumping area situated at some 50 meter away, i.e. at the far end of the Site. The Plaintiff was provided with a wheelbarrow for the job.
2. At about 4:30 p.m., when the Plaintiff was pushing the wheelbarrow loaded with earth along the pavement towards the dumping area, the front wheel of the wheelbarrow kicked against a piece of brick and it overturned. When the Plaintiff tried to hold on to the wheelbarrow, attempting to balance it, he sprained his left ankle.
3. The Plaintiff testified that the pavement between the ditch and the dumping area was covered by rocks, sand and mud as a result of the excavation work. Some of the bricks on the pavement near the dumping area were loosened because of the frequent to-and-fro visits of the wheelbarrow. The Plaintiff believed that it was one of these loosened bricks which the wheel of the wheelbarrow kicked.
4. The pavement was the only passageway between the ditch and the dumping area. The Plaintiff commented that the Defendants could have placed pieces of wooden planks on the pavement in order to provide a safe means of access for the Plaintiff to convey the excavated earth from the ditch to the dumping area. Had the Defendants done that, this accident could have been avoided.
5. The Plaintiff claims that the accident was caused by the negligent and/or breach of statutory duties under the Construction Sites (Safety) Regulations (CSSR) and the Occupier’s Liability Ordinance (OLO) and/or breach of the contract of employment.

The Defence Case

1. Defence adduced two witnesses.
2. Mr. Siu Wai Ping (DW1) was the project supervisor of the 1st Defendant. He confirmed that the 1st Defendant was the main contractor of the Site and the Plaintiff was an employee of the 2nd Defendant.
3. He testified that on the day in question, at around 2:00 p.m., he had been to the Site and he found nothing unusual. However, he was not at the Site when this accident allegedly happened. He said he came across the Plaintiff at the Siu Sai Wan depot at around 6:00 p.m. after the Plaintiff finished his work. The Plaintiff made no complain to DW1 about being injured at work, nor did he notice the Plaintiff suffering any injuries. It was not until 10 October 2003 that the Plaintiff submitted to the company an industrial accident report revealing this accident.
4. Mr. Tsang Kwong Fai (DW2) was the foreman of the 1st Defendant. He testified that from 4:00 p.m. to 5:00 p.m. on 7 October 2003, he was in a car which was parked on the side of the road opposite the Site. He was there waiting for a friend. While waiting, he noticed the Plaintiff and they greeted each other. DW2 said he saw no accident at all. At around 5:10 p.m., he saw the Plaintiff packed his tools and left the Site.
5. In cross-examination, DW2 agreed that his position could not see clearly the location near the dumping area where the alleged accident took place.
6. The Defence, in a gist, denied that there was such an accident. Furthermore, it contended that even if there was such an accident, it is the Plaintiff’s own fault and had nothing to do with the three Defendants.

Was there such an Accident?

1. The Plaintiff gave a very detailed description of how the accident took place. He was the only witness of his own accident. DW1 was at the Site on the day in question but he was not present at the time the accident allegedly happened. DW2 was in the vicinity but his position did not afford him a clear view of the location where the accident allegedly took place. Therefore, there was no evidence to the contrary of the Plaintiff’s.
2. It is clear that the Plaintiff went to Tuen Mun Hospital the following morning. He attended the A & E Department and complained that he suffered a sprain at his left ankle during work. This shows consistency of his allegation.
3. After considering all the evidence, I am satisfied that the accident did take place.

Liability

1. R. 38A (2) of the CSSR provides:-

“The contractor responsible for any construction site shall ensure that, so far is reasonably practicable, suitable and adequate safe access to and egress from every place of work on the site is provided and properly maintained.”

R. 38AA (2) imposes a similar duty to “any contractor who has direct control over any construction work”.

1. The three Defendants, being the main contractor and subcontractors of the Site, were therefore having a duty under these regulations to ensure, “so far is reasonably practicable”, safety of places of work in a construction site.
2. S. 3 (1) of OLO provides:-

“An occupier of premises owes the same duty, the ‘common duty of care’, to all his visitors ……”

S. 3 (2) provides:-

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

1. Defence submitted that the Defendants were not “occupier” of the pavement because it was a public place. However, evidence is clear that the whole Site, including the part of the pavement which provided a passageway between the ditch and the dumping area, was fenced off by railings.
2. The three Defendants, being main contractor or subcontractors of the Site, would be in control or direct occupier of the Site. Therefore, they all have a duty of care to lawful visitor like the Plaintiff who was employed to work there.
3. The 2nd Defendant, being the employer of the Plaintiff, no doubt has an implied duty of care under the contract of employment to ensure the safety of the Plaintiff in the course of employment.
4. Finally, being the main contractor and subcontractors of the Site, the three Defendants would owe a duty of care to all persons who were present in the Site.

Breach of Duties?

1. The Plaintiff injured himself in the course of carrying out his duty, namely, conveying the excavated earth from the ditch to the dumping area. The pavement in question was the only means of access. The work in the Site required workers to dig a ditch and it is for someone to carry the excavated earth and rocks to the dumping area. It is therefore reasonably foreseeable that the pavement could be covered by obstacles such as rocks and mud, and some of the bricks might get loosened, therefore, might become hazardous to workers using the pavement.
2. The 2nd Defendant, being the person in direct control of the Site and employer of the Plaintiff, should ensure, so far is reasonably practicable, that the pavement was safe for its worker, including the Plaintiff. The 2nd Defendant could have assigned someone, or gave specific instructions to the Plaintiff, to clear all obstacles in the passageway, or it could level the surface of the pavement by laying on it wooden planks. These are all reasonably practicable steps yet it is apparent that the 2nd Defendant took no step at all to ensure that the pavement was safe.
3. The 1st Defendant, being the main contractor, and the 3rd Defendant, being the subcontractor, should bear the same duty as the 2nd Defendant. Therefore, all Defendants were in breach of their duties.
4. Defence submitted that it would be far more dangerous if wooden planks were laid on the surface of the pavement because the wooden planks could end up unsupported by the soft ground underneath. This, however, is supported by no evidence at all.

Contributory Negligence

1. Defence submitted that the Plaintiff was himself under a duty of care to ensure that he was walking or standing or working in a way he would not slip and/or fall. Furthermore, it was the Plaintiff who allowed the excavated bricks and earth being left on the passageway. Being an experienced worker, the Plaintiff should reasonably foresee the risk of injuring himself and therefore should exercise reasonable care during the work. In failing to do so, the Plaintiff was himself negligent.
2. There is, however, no evidence suggesting that the Plaintiff had carried out his work in a risky manner, e.g. that he was pushing the wheelbarrow too fast, or that he had overloaded it, or that he had picked a path he should not pick. The fact that he held on to the wheelbarrow when it overturned was a spontaneous response. In short, the Plaintiff was performing his duty in an ordinary manner when the accident occurred. I fail to see how the Plaintiff was negligent.

Quantum

1. The Plaintiff was born on 22 May 1961. He was 42 years old at the time of the accident. He is now 46.
2. At the time of accident, he was employed by the 2nd Defendant as a driver and worker with an average monthly earnings of $11,509.

Injuries and Treatment

1. The Plaintiff was injured on 7 October 2003. He sought treatment from the A & E Department of Tuen Mun Hospital on 8 October 2003. Examination revealed that there was tenderness, swelling and bruising around the lateral malleolus of his left ankle. The left ankle joint movement was limited by pain. Radiological examination revealed fracture of distal fibula Weber Type B. The Plaintiff was admitted to the Department of Orthopaedics on the every same day. He was treated conservatively for his fracture and he was discharged on 10 October 2003.
2. The Plaintiff was then referred to the Physiotherapy Department of the Tuen Mun Hospital. His first attendance was on 8 January 2004. At that time, the Plaintiff still complained of left ankle pain over its lateral aspect. It was found that there was still swelling over the left ankle. The active range of motion of left ankle dorsiflexion, plantar flexion and eversion were full but only 2/3 range for inversion. The Plaintiff could walk unaided but with a limping gait and with mild pain. Treatment in the form of magnetic field therapy, ice therapy, active mobilization exercise and cycling exercise with pain free resistance were given. The Plaintiff did not attend further physiotherapy treatment after this first session.
3. The Plaintiff was granted sick leave from 8 October 2003 to 3 March 2004 and from 17 May 2004 to 15 December 2004.
4. The Plaintiff sought further treatment from the 24-hour Ambulatory Clinic of Pok Oi Hospital on 29 January 2005. Examination revealed that he could walk freely but with a limp and pain. There was no swelling of the ankle and the range of movement of his ankle was full. He could squat but suffered pain on full weight bearing. The Plaintiff was granted sick leave from 29 January 2005 to 16 February 2005.
5. The Plaintiff was referred to the Physiotherapy Department of Tuen Mun Hospital again on 17 February 2005. The Plaintiff attended in total seven sessions of physiotherapy treatment between 31 March 2005 and 13 May 2005.
6. The Plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board on 29 December 2004 to have suffered 2% loss of earning capacity. On review, the assessment remained unchanged.
7. The Plaintiff was examined by Dr. Tsoi on 13 February 2006. Dr. Tsoi opined that the Plaintiff’s left ankle injury had attained a stage of maximal medical improvement and no further treatment would be needed. The Plaintiff’s overall prognosis was considered good.
8. Dr. Tsoi also opined that the Plaintiff could resume his pre-injury work though he would suffer some reduction in his capacity. Dr. Tsoi assessed the Plaintiff to have suffered 2% impairment of the whole person and 4% loss of earning capacity as a result of the injury.

PSLA

1. I found that the Plaintiff’s injury fell at the lower end of the serious injury category, an award of $150,000 under this head is reasonable.

Pre-trial Loss of Earnings

1. There is no dispute that the Plaintiff’s average monthly earnings at the time of accident was $11,509. After the accident, the Plaintiff received treatment from both hospitals in Hong Kong and Mainland China until sometime in May 2006. Then he started to look for a job by registering with the Job Placement Unit of the Labour Department and by referral through his friends. Yet, it was only until January 2007 that the Plaintiff managed to find a job of working as a driver on casual basis at a daily wage of $300. He worked a total of 15 days in January 2007, earning a total income of $5,000. Since February 2007, the Plaintiff started to run his own business in Mainland China, selling accessories and arranging transportation services for others. On average, the Plaintiff earns about $10,000 per month.
2. The Pre-trial loss of earnings therefore should be:-
   * 1. Between 8 October 2003 and 31 December 2006

$11,509 x 38 months, i.e. $437,342

* + 1. Between 1 January 2007 and 24 July 2007

($11,509 - $5,000) x 1 month + ($11,509 - $10,000) x 5¾ months, i.e. $15,185.75

Therefore, the total award under this head is $452,527.75.

Pre-trial loss of MPF contribution is:-

$452,527.75 x 5%, i.e. $22,626.39

Future Loss of Earnings

1. The Plaintiff is now 46 years old. Assuming the normal retirement age is 65, a multiplier of 11 is reasonable.

Therefore, the Plaintiff’s future loss of earnings:-

($11,509 - $10,000) x 12 x 11, i.e. $199,188

Post-trial loss of MPF contributions is:-

$199,188 x 5%, i.e. $9,959.40

Loss of Earning Capacity

1. The Plaintiff’s own doctor opined that the Plaintiff could resume his pre-injury work though he would suffer some reduction in his capacity. Furthermore, the Plaintiff’s overall prognosis was considered good.
2. Before accident, the Plaintiff was employed as a driver though he was also required to perform some labour work. I fail to see why the Plaintiff could not secure a similar kind of work in future in the light of the Plaintiff’s present condition. I will make no award under this head.

Special Damages

1. The Plaintiff claims a sum of $42,698, being the amount of expenses he incurred as a result of the injuries. These expenses included treatments the Plaintiff received in hospitals in both Hong Kong and Mainland China; the related travelling expenses and the required accommodation expenses when he received his treatment in China. Most if not all of these expenses were supported by receipts. I found the sum reasonable.

Summary of Damages

HK$

1. (1) PSLA 150,000.00

(2) Pre-trial Loss of Earnings 452,527.75

(3) Pre-trial Loss of MPF contributions 22,626.39

(4) Future Loss of Earnings 199,188.00

(5) Post-trial Loss of MPF contributions 9,959.40

(6) Loss of Earning Capacity NIL

(7) Special Damages 42,698.00

Sub-total 876,999.54

Less: EC Award 46,032.06

Advance Payment 118,971.50

Total 757,981.72

Interest

1. Interest on PSLA: 2% p.a. from the date of writ of summons to date of judgment

Interest on pre-trial loss of earnings, loss of pre-trial MPF contributions and special damages shall be half of judgment rate from date of accident to date of judgment.

Costs

1. I will make an order nisi for costs in favour of the Plaintiff. To be taxed if not agreed.

( A. Yuen )

Deputy District Judge

Representation:

Ms. Julia Lau instructed by Messrs. Vincent T.K. Cheung, Yap & Co. for the Plaintiff.

Mr. Matthew Chong instructed by Messrs. Erwin Young, Chu & Law for the 1st to 3rd Defendants.