DCPI 932/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSON INJURIES ACTION NO. 932 OF 2007

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BETWEEN

##### CHENG MUK PING Plaintiff

##### and

##### CHAN’S MACHINE ENGINEERING Defendant

##### COMPANY LIMITED

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Coram : Her Honour Judge H.C. Wong in Court

Date of Hearing : 16 September 2008

Date of Handing Down Judgment : 20 October 2008

JUDGMENT

1. The Plaintiff claims against the Defendant, his former employer, for damages under negligence, breach of common duty of care under the Occupier’s Liability Ordinance Cap. 314, breach of statutory duty under the Factories and Undertakings (Lifting Appliances and lifting gear Regulations) Ordinance Cap. 595 and vicarious liability.
2. The Defendant denies liability and claims the accident was caused by or contributed to by the negligence of the Plaintiff.

Background

1. The Plaintiff was employed by the Respondent to work at its machine workshop in Kam Chin Village, Sheung Shui, New Territories (‘the workshop’). On 22 September 2004, he suffered an injury to his right foot. At the time, he was instructed to paint the pull arm of a bulldozer, he was assisted by a machine mechanic Yip Pak Shing (‘Mr. Yip’).
2. Intending to disconnect and transport the push arm with an attached drill head with Mr. Yip operating the bulldozer, the Plaintiff was standing next to the push arm trying to keep it from swinging side to side, the push arm (‘bobcat’) suddenly dropped onto the ground injuring the Plaintiff’s foot.

**Liability**

The Plaintiff’s Case

1. The Plaintiff (“Mr. Cheng”) claimed it was necessary and a regular practice for him to stand close to the push arm to keep it from swinging from side to side. He further claimed that the accident happened because Mr. Yip had made a mistake in operating the bulldozer by releasing the bobcat (push arm) causing it to drop onto the ground hitting the Plaintiff on his right foot. The Plaintiff further claimed Mr. Yip was a fellow employee of the Defendant.

The Defendant’s Case

1. The Defendant denied Mr. Yip was its employee. Mr. Chan Kin Keung, the sole proprietor of the Defendant, claimed Mr. Yip was an independent contractor for the maintenance work of the Defendant. Mr. Yip would attend the Defendant’s workshop daily and Mr. Chan would give him work instruction each day. On the morning of the accident, Mr. Chan had instructed both Mr. Yip and the Plaintiff to paint the push arm of the bulldozer.
2. The Defendant further claimed the Plaintiff was standing too close to the push arm and failing to prevent the accident therefore had contributed to it.
3. Mr. Chan did not see the accident as he was working inside the workshop container office. He claimed he did not know Mr. Yip was operating the bulldozer until after the accident. He claimed Mr. Yip was a contractor and was paid a daily fee of $600. Under cross-examination and confronted with a letter from the Defendant’s solicitor dated 28 February 2008 (p.108 of bundle), Mr. Chan accepted the Defendant did admit Mr. Yip to be its employee but he claimed that in the Defendant’s tax returns Mr. Yip was reported as the Defendant’s contractor.

Issues

1. I Was Mr. Yip an employee of the Defendant and was the Defendant vicariously liable to the Plaintiff ?

II Did the Defendant owe the Plaintiff a duty of care to provide a safe system of work and proper supervision?

III Did the Plaintiff contributed to the accident?

I Was Mr. Yip an employee of the Defendant and was the Defendant vicariously liable to the Plaintiff ?

1. Mr. Chan claimed in court Mr. Yip was not an employee of the Defendant although there was an admission in writing from the Respondent’s solicitor that Mr. Yip was an employee. Mr. Chan gave a description of the pattern of Mr. Yip’s daily work with the Defendant. He claimed Mr. Yip would attend the Defendant’s workshop every morning and Mr. Chan would instruct him to take up maintenance work on the Defendant’s machines. He was paid a daily sum of $600. However, he was not able to give a satisfactory answer when he was asked how much Mr. Yip would be paid if the work would only take half a day. Mr. Chan admitted in Court he had instructed Mr. Cheng and Mr. Yip to paint the push arm on the day of the accident. Based on Mr. Chan’s description, it is obvious Mr. Yip was employed to work on the maintenance of the Defendant’s machines just as the Plaintiff was. As Mr. Yip was not called to give evidence at the trial in spite of his being an eye witness to the accident, on the evidence before me, the Applicant’s evidence on the accident and the Defendant’s solicitor’s admission by letter before the trial overwhelmingly showed Mr. Yip was the Defendant’s employee at the time of the accident.
2. The Court of Final Appeal in the case of Ming An Insurance Co. (HK) Ltd. v. Ritz-Carlton Ltd. [2002] HKLRD 844 held at pp.850-854 that the test for vicarious liability is ‘close connection’. Bokhary PJ held in para. 14:

“ 14. For a long time, the English courts applied – and the Hong Kong courts following suit likewise applied – the test commonly called the *Salmond* test. This is the test first formulated in *Salmond* on *Torts* (1st ed., 1907) at p.83 and still to be found in *Salmond & Heuston* *on the Laws of Torts* (21st ed., 1996) at p.443. The *Salmond* test operates thus. Employers are liable for torts committed by their employees in the course of their employment. And an employee’s tort is deemed to have been committed in the course of his employment if it is either (a) something authorised by his employer or (b) an unauthorised mode of doing something authorised by his employer.

15. The “unauthorised mode” limb of the *Salmond* test can give rise to difficulty. And in *Lister v Hesley Hall Ltd*  [2002] 1 AC 215 the House of Lords adopted a new test. Under this new test, the question is whether the employee’s tort was so closely connected with his employment that it would be fair and just to hold his employer vicariously liable.

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25. For all the foregoing reasons, I regard close connection as the basic criterion for vicarious liability in regard to all torts committed by an employee during an unauthorised course of conduct, whether international wrongdoing or mere inadventence is involved.”

1. The pattern of Mr. Yip’s daily routine and the way he was paid confirmed he was working on Mr. Chan’s instructions daily and received a daily wage of $600. Furthermore, with the earlier admission, I have no doubt that Mr. Yip was an employee of the Defendant had caused the accident that injured the Plaintiff by operating the bulldozer negligently. As it was in the course of his employment even though the Defendant might not have intended Mr. Yip to be the operator of the bulldozer, under the close connection test, the Defendant as his employer is vicariously liable to the Plaintiff.

II Did the Defendant owe the Plaintiff its employee a duty of care by providing a safe system of work and proper supervision?

1. It is the Plaintiff’s evidence that he had to stand close to the push arm to keep it steady with his hand. This is obviously not a safe practice, but he admitted it is known to Mr. Chan and Mr. Yip. Clearly, Mr. Chan had failed to devise a safe work practice for the Plaintiff.
2. There was no evidence that the work was under anyone’s supervision. Mr. Chan made it clear that after he gave the instructions to Mr. Yip and the Plaintiff, he had gone into his container office to work.
3. Mr. Chan said he had expected the Plaintiff to be operating the bulldozer because the Plaintiff possessed a licence. At the trial, Mr. Cheng produced the documents showing he did not possess a valid licence at the time of the accident. He claimed Mr. Yip did have a valid licence at the time.
4. In defining a ‘safe system of work’, Bokhary P.J. in the Court of Final Appeal case of Cathay Pacific Airways Ltd. v. Wong Sau Lai [2006] HKCU 810 referred to Lord Green’s dictum in Speed v. Thomas Swift & Co. [1943] KB 557 at p.569-544:-

“I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job – the setting of the stage, so to speak – the sequence in which the work is to be carried out, the provision is proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.”

1. There is no doubt in my mind, the Defendant had failed to supervise the execution of the painting of the push arm or to devise a safe procedure for Mr. Yip and the Plaintiff to follow so that an industrial accident could be avoided. The Defendant is therefore liable to the Plaintiff.

III Did the Plaintiff Mr. Cheng contributed to the accident?

1. Mr. Chan agreed in his evidence in Court that Mr. Cheng would have to put his hand on the hanging load to steady it. As that was the only procedure known to Mr. Cheng and Mr. Yip which Mr. Chan had accepted, then Mr. Cheng could not be guilty of contributory negligence. It was the Defendant’s duty to devise a safe system of work for its employees.

Quantum

1. Mr. Cheng was employed by the Respondent on 15 August 2004, just over one month before the accident, to service the Respondent’s machines hired out at various construction sites. He claimed his daily wage was $500 and he worked 26 days a month therefore earning a monthly wage of $13,000. Based on the Plaintiff’s employment record at the Defendant, the Plaintiff did work 26 days between 16 August and 15 September. Therefore, there is strong evidence to support the Plaintiff’s claim based on a monthly salary of $13,000. This is further supported by the $55,731 payment from the Defendant in the 5.72 months of sick leave at ¾ of the Plaintiff’s pre-accident payment. I accept the Plaintiff’s compensation should be based on a monthly salary of $13,000.

Pain, Suffering and Loss of Amenities

1. The Plaintiff sustained a Lisfranc fracture on his right foot second metatarsal. He was taken to the North District Hospital immediately after the accident where he received an operation of open reduction and internal fixation. His foot was put in a cast for 6 weeks. He was discharged from hospital on 2 October 2004 with a pair of crutches. After the cast was removed, he was told not to put weight on his right foot. On 29/1/05, he was admitted to hospital for removal of all the screws inserted.
2. He complained to Dr. Kong Kam Fu, the orthopaedic expert, on the day of the interview of 3 May 2007 that he suffered from continuous pain in the right foot when he began walking or pushing the pedal with his foot; he could no longer run or squat down, he had difficulty walking up and downstairs. He further suffered from right ankle stiffness. (see p.49-50 of bundle).
3. Dr. Kong reported he had walked into the doctor’s clinic in a normal gait, he was able to walk on his heels but not on tiptoe, he could only stand on his left leg, and he could only do ¾ of a normal squat.
4. Dr. Kong confirmed the Plaintiff suffered from a Lisfranc fracture of the 2nd metatarsal with residual pain and stiffness. This is consistent with the findings of the Employees’ Compensation Board of 4 April 2007 which assessed the Plaintiff’s loss of earning capacity caused by the injury to be 8%.
5. Dr. Kong found the physiotherapy and occupational therapy treatments Mr. Cheng received to be appropriate. Dr. Kong reported that apart from complaining of residual pain and stiffness, Mr. Cheng complained also of limitation of movements of his right ankle. Dr. Kong confirmed Mr. Cheng suffered from a weakness on his right leg due to the accident. Dr. Kong assessed Mr. Cheng suffered from a 10% whole person impairment based on the AMA guide to evaluation of permanent impairment (5th ed.) and the same for his loss of earning capacity.
6. Mr. Cheng claimed that the injury and disabilities had prevented him from taking part in sports that he used to enjoy such as swimming, jogging, social dancing and mountaineering.
7. Mr. Wong, counsel for Mr. Cheng asked for $350,000 under this head comparing to the awards in the case of Yau Sung Bik Yu v. Lie Ching Man [2008] HKEC 581 of $180,000 and Ho For Sang v. Lau Sun Choi [ 2003] 1 HKLRD, A15, of $460,000 where the Plaintiff suffered from a compound fracture to two metatarsal bones and dislocation of 3 interphalangeal joints resulting in 30% loss of earning capacity.
8. Mr. Chow, counsel for the Defendant, relied on the case of Yeung Kin Chung v. HK Scafform Supplies Ltd. & anor. DCPI 1332/2005 where the court awarded $180,000 under PSLA. He further relied on the case of Chan Chan Ping v. Colliers Jardine Management Ltd. [2003] HKLRD 433, where the lift attendant suffered a crushed injury to his left big toe resulting in 8.4% impairment of the whole person and 15.4% loss of earning capacity. The court awarded him $180,000 under PSLA.
9. The type of injuries suffered by Mr. Cheng had caused him a lot of pain at the time and during the treatment, it continued to be painful when he put pressure on the right foot; it is fortunate he was able to return to work full time after a prolonged period of treatments over 6 months.
10. Compared to the victims in the cases referred to me, I am satisfied for his pain and suffering, loss of amenities, the award should be $180,000.

Loss of earnings

Pre-trial loss

1. I accept Mr. Cheng’s pre-accident wage was $13,000 p.m. (see para. 19 above). His sick leave was for 5.72 months during which time he was paid by the Defendant a total sum of $55,731, representing approximately 75% of Mr. Cheng’s wages. If not for the accident, he would have earned $74,360.
2. On 16 March 2005, Mr. Cheng returned to work with the Defendant until 28 May 2005 when he felt he could not carry out the strenuous duties at the Defendant’s workshop due to his disabilities after the accident. He took up less demanding work on 16 June 2005 working at recycling companies and also as a gardener. Between 16 June 2005 and 16 September 2008, he earned a daily wage between $350 and $420.
3. Mr. Cheng claimed a loss of $100 daily wage for 28 days a month i.e. a loss of $2,600 per month. The pre-trial loss from 15 June 2005 to 16 September 2008 was 27 months which makes to a total of $(2,600 x 27) = $70,200.
4. The pre-trial loss is therefore:

$(74,360 + 70,200) - $55,731 = $88,829.

Post-trial loss

1. The parties agreed on the multiplicant of Mr. Cheng who is now 44.5 years old at 9.5.
2. For reasons explained above, I do not agree that Mr. Cheng suffered no loss of income and that he was merely earning $5,880 p.m. before the accident. If he was able to find casual work after the accident which paid $350 to 420 per day, his pre-accident wage should have been higher. I am satisfied that his future loss is $2,600 per month.
3. His future loss is therefore:

$2,600 x 12 x 9.5 = $296,400.

Loss of earning Capacity

1. This claim is intended to compensate Mr. Cheng for the disability he would suffer in the job market in future. Mr. Wong submitted that Mr. Cheng has suffered a disadvantage because he can no longer drive a bobcat due to his disabilities.
2. On the basis that Mr. Cheng had been compensated for his future loss of earnings at $2,600 p.m. for a multiplier of 9.5 to cover the rest of his working life, I do not think he should recover a further sum for the loss of earning capacity. This is particularly so when he has proven himself to be a resourceful person and was able to find work in different fields including working as a driver, a gardener and causal labourer in recycle companies.

Special damages

1. The parties have agreed this item at $5,463.

Summary

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| PSLA | 180,000 |
| Pre-trial loss of earnings | 88,829 |
| Post-trial loss of earnings | 296,400 |
| special damages 5,463 | |
| Total | $570,692 |

Interests

1. For damages under PSLA, interests at 2% p.a. from the date of writ to the date of judgment. Interests on special damages at half judgment rate from date of accident to date of judgment, thereafter interests at judgment rate. Interests to be calculated and included in the judgment.

Costs

1. Costs – costs nisi to the Plaintiff to be taxed if not agreed with certificate for Counsel. The order will be made absolute should there be no application on costs within 14 days of the day of this judgment. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

( H.C. Wong )

District Court Judge

Parties :

Mr. Wong, Meyrick W.K. instructed by Messrs. Kitty So & Tong for the Plaintiff.

Mr. Chow Ho Hon Eric instructed by Messrs. C.L. Chow & Macksion Chan for the Defendant.