#### **DCPI 959/2006**

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### **PERSONAL INJURIES ACTION NO. 959 OF 2006**

------------------------

|  |  |  |
| --- | --- | --- |
| BETWEEN | FUNG MEI FAN | **Plaintiff** |
|  | and |  |
|  | TUNG WAH GROUP OF HOSPITALS | Defendant |

------------------------

##### **Coram: Deputy District Judge R. Cheung in Court**

Dates of Hearing: 13th and 14th March 2007 and 30th April 2007

Date of Handing down Judgment: 14th May 2007

--------------------

JUDGMENT

--------------------

1. The Plaintiff claims for damages for personal injuries sustained during work. Her case is that it was the negligence of her employer, the Defendant, which caused her injuries. The Defendant takes issue on both quantum and liability. Both parties are legally represented.

2. The main thrust of the Plaintiff's case is that she sustained injury to her left shoulder owing to strenuous exertion over an extended period of time during work on 19 April 2004 when she had to, inter alia, continuously sweep away the water that came out from a burst pipe.

3. The Plaintiff also claims that she had sustained a neck injury. I would focus on her shoulder injury first. The medical evidence shows that at the earlier stage, the diagnosis is a sprained left shoulder with tense left shoulder muscle coupled with complaints of left shoulder pain. The Plaintiff's case is that she had been granted 403 days of sick leave.

The Law and Discussion

4. At trial, Counsel for the Plaintiff is no longer relying on any alleged breach of statutory duties under the Occupiers Liability Ordinance. The claim is thus grounded on alleged breaches of a contractual as well as a tortious duty of care, as well as alleged breaches of statutory duties under the Occupational Safety and Health Ordinance ("OSHO").

5. In the context of this case, I consider the Defendant's duty of care towards the Plaintiff under contract is coextensive as that of the duty of care in tort. Also, I consider that the alleged breaches of the OSHO does not take the Plaintiff's case any further. I consider that if negligence is not established, the allegation of breaches of statutory duties under the OSHO will also fall away. In other words, the Plaintiff's case will either stand or fall depending on whether negligence is established.

6. There is no dispute on the general principles applicable on the question of negligence. In the circumstances, I find it convenient to simply set out and adopt paragraphs 8 to 11 of the Opening Submission of Counsel for the Plaintiff, as follows:

"8. In *Wilsons & Clyde Coal Co. Ltd. v English* [1938] A.C. 57, at page 84, the general nature of the duty owed by a master to a servant was described by Lord Wright as follows : -

“I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether or not the employer takes any share in the conduct of the operation. The obligation is threefold, as I have explained [i.e. the provision of a competent staff of men, adequate material, and a proper system and effective supervision.]”

9. In deciding what amounts to negligence, the court in *Blyth v Birmingham Waterworks* (1856) 11 Ex. 781 at 784 held that :-

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

10. The court would take certain matters into consideration in order to determine whether the defendant has acted reasonably. In *Morris v. West Hartlepool Steam, Navigation Co. Ltd.* [1956] A.C. 522, at 574, Lord Reid said :-

“It is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weight, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expenses and any other disadvantage of taking the precaution.”

11. In *Winter v Cardiff Rural District Council* [1950] 1 All ER 819, the House of Lords held that:

“The duty of the employer is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. Where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently it is natural and reasonable that it should be left to the foremen or workmen on the spot. The giving of proper instructions may well be a part of a proper system of working, and the omission to give them may constitute a defect in the system of working, or, alternatively, a breach of the employer’s obligation to take reasonable steps for the safety of those employed on the task.”

7. I would also note the following discussion in paragraph 10-17 of Charlesworth & Percy on Negligence, 11th edition:

“Although a single, personal duty, in order to understand properly its scope, the employer's duty needs to be considered under five separate heads, which may frequently overlap: (i) to provide a safe place of work, including a safe means of access; (ii) to employ competent employees and supervision; (iii) to provide and maintain adequate plant and appliances; (iv) to provide a safe system of work; and (v) other cases.”

8. Counsel for the Defendant does not dispute that the question of negligence here will turn on whether the Defendant has provided the Plaintiff with a safe system of work. In other words, it is not contended that the incident was a one-off situation which does not call for the implementation of a system of work. I would go along with that although it is also apt to note the following discussion in paragraph 10-67 of Charlesworth & Percy supra:

"Duty to prescribe a safe system of work. It is a question of fact whether or not there is need for a system of work to be prescribed in any given circumstances. In deciding it, regard ought to be had to the nature of the work, that is whether properly it requires careful organisation and supervision, in the interests of safety of all those persons carrying it out; or it can be left by a prudent employer confidently to the care of the particular man on the spot to do it reasonably safely. There was no failure to provide a safe system where an employee was faced with a "one-off" task requiring the exercise of common sense and it was difficult to see what relevant instruction could have been given to him. But an employer is under a duty to prescribe a system of work, even where the operation is a single one, if it is necessary in the interests of safety…….."

9. I would also note the following discussion in paragraph 10-66 of Charlesworth & Percy supra:

"Meaning of system of work. A system of work is the term used to describe (i) the organisation of the work; (ii) the way in which it is intended the work shall be carried out; (iii) the giving of adequate instructions (especially to inexperienced workers); (iv) the sequence of events; (v) the taking of precautions for the safety of the workers and at what stage; (vi) the number of such persons required to do the job; (vii) the part to be taken by each of the various persons employed; and (viii) the moment at which they shall perform their respective tasks…….."

The witnesses

10. The Plaintiff herself is the only witness called on her side. The Defendant has only called one witness who is the supervisor of the Plaintiff at the time of the incident. Their evidence did conflict to an extent on certain details most of which are of little or no significance. There is no acute conflict of evidence on the more crucial matters.

Facts and Discussion

11. It is not in dispute that the Defendant operates a geriatric centre for the elderly called "Y.C. Liang Memorial Home for the Elderly" ("the Centre") at the Ground Floor and 1st Floor of Yiu Yat House, Tin Yiu Estate, Tin Shui Wai, New Territories, Hong Kong. Tin Yiu Estate is the property of the Housing Authority but the day to day management of the estate was contracted to a management company called Synergis Management Company ("Synergis").

12. It is not in dispute that the Plaintiff was employed by the Defendant as a Workman II at the Centre.

13. It is not in dispute that the Plaintiff's routine scope of work included the moving of furniture, cleaning and waxing the floor, physical transferral of the residents of the Centre, setting table for meals, cleaning the dishes and utensils and changing light bulbs. She also performed duties outside the Centre like shopping and going to the banks.

14. Under cross examination, the Plaintiff agreed that her routine work involved heavy manual duties. I do not consider it accurate to describe her such duties as heavy duties or as light duties. Medium is the appropriate word. It is however clear that she is a manual worker accustomed to perform manual work.

15. It is not in dispute that the Plaintiff had been thus working for the Defendant since 1997. The incident in question happened on 19 April 2004. She was born on 4 June 1958 and so she was close to 46 years old at the time of the incident.

16. The location where the incident unfolded should be explained. There is no dispute about the physical setting of the incident. The Plaintiff has produced a sketch at Folder E, page 200 of the Plaintiff's bundle of documents (hereafter "E200", mutatis mutandis). The Defendant has also produced a sketch at page 17 of the Defendant's bundle of documents (hereafter "DB17", mutatis mutandis). The Defendant's sketch is perhaps more to scale but the Plaintiff's sketch has the merit of simplicity. I would use the Plaintiff's sketch ("the sketch") as the starting point.

17. The sketch shows that the 1st Floor of the Centre is divided into 3 wings: Wing A, Wing B and Wing C respectively. Wing A extends from the right hand side of the sketch towards the middle. Wing B extends from the left hand side of the sketch towards the middle. Wing C extends from the bottom of the sketch towards the middle. The 3 wings are all long straight corridors with rooms on both sides of the corridors. They converge at the middle part of the Plaintiff's sketch.

18. Nothing of any significance turns on Wing B and Wing C in this case.

19. As for Wing A, based on the orientation of the sketch, on the lower side of the Wing A corridor are 4 rooms from the left to the right: a T.V. room, Room 12, Room 10 and Room 8. On the upper side of the Wing A corridor are also 4 rooms from the left to the right: Room 13, Room 11, Room 9 and Room 7.

20. Between Room 12 and Room 10 is an exit to a staircase which leads to the Ground Floor of the Centre.

21. It is not in dispute that the Plaintiff had been working with 2 other female workers that day. They are Yeung Lai Ping ("Yeung") and To Siu Ching ("To"). By 6:30 pm, To had already clocked off and was about to leave. Yeung was also about to be off duty soon. The Plaintiff worked the 1 pm to 9 pm shift that day.

22. It is not in dispute that the toilets of the Centre were then undergoing renovation. Because of the renovation works, Rooms 7, 9 and 10 were all vacant and unoccupied at the time. Inside Room 10 is a toilet cubicle with a door which opened inward. The renovation workers had dismantled the water closet/stool inside. By 6:30 pm, the renovation workers had finished their work for the day and were already gone.

23. According to the Plaintiff, Yeung was the first person to discover that water was flooding out from Room 10. The Plaintiff then had just finished her dinner in the canteen downstairs and came up to the 1st Floor. It was then about 6:30 pm. Counsel for the Defendant did not seriously contend that the incident started a bit earlier. I accept that it started at 6:30 pm.

24. It is not in dispute that at the time, DW1 Cheung Chi Choi ("Cheung"), an Enrolled Nurse, was responsible for the supervision of the Plaintiff's work. Cheung was also the supervisor of Yeung and To.

25. According to the Plaintiff, Cheung, Yeung and the Plaintiff all entered Room 10 to check out the situation. They opened the door of Room 10 and left it open thereafter. The door of the toilet cubicle inside Room 10 was closed at the time.

26. According to the Plaintiff, the water level inside Room 10 was ankle deep. Cheung said it was about 1 cm deep. I rather find it was something in between these two estimates.

27. The Plaintiff said that Cheung and Yeung had tried to open the toilet cubicle door but their attempt was unsuccessful at first. The Plaintiff came to help and eventually the cubicle door was opened. It was thereafter left open. Cheung said that the toilet cubicle door was thereafter closed but that water could still come out at the bottom of the cubicle's door even when it was closed. I accept the Plaintiff's version.

28. According to the Plaintiff, the water trapped inside the toilet cubicle was as high as the water closet/stool.

29. It is not in dispute that a flushing water pipe inside the toilet cubicle of Room 10 had burst and water was gushing out. The control switch of the pipe was loosened and had fallen off so the switch could not be used. The drainage outlet inside the toilet cubicle was blocked and the water was thus trapped inside. In other words, there was nothing that could be done at the spot to stop the water from flowing out of the burst flushing water pipe.

30. I pause to note that the burst of the flushing water pipe inside the toilet cubicle is an accident, not a matter of daily routine. Water pipes do burst, but such occurrences are rare. I accept that burst pipes are reasonably foreseeable. But that the pipe should burst at a time when the drainage outlet was blocked would make the occurrence of such a situation even more rare and less foreseeable. I am prepared to accept nonetheless that it is still reasonably foreseeable, although only at the lower end of the parameter of reasonable foreseeability.

31. The Centre housed old inmates. The old folks are probably physically weaker and much less mobile than the average person on the street. However, there is no question of their getting drowned by the water coming out from a burst pipe. There is a risk of the floor becoming slippery and people may slip and fall. The floor can be made dry and the risk can be reduced by exercising greater care.

32. The Plaintiff said that she was aware of at least two previous incidents involving water leakage within the Centre. These past incidents happened during daytime and did not involve the burst of water pipes. The situation came under control very soon. These past events do not make the subject incident highly foreseeable.

33. I am not prepared to find that the burst of a flushing water pipe would constitute a risk of big magnitude at the Centre. I do not consider that the Defendant is at fault in not providing a powerful water pump that may be deployed to pump away the water.

34. According to the Plaintiff, upon discovery of the pipe burst, Cheung and Yeung both said that brooms and towel blankets should be fetched. These things were fetched, together with water sweepers, to combat the problem.

35. I accept that Cheung had done very little by way of planning or organising the work of combating the water flow in the entire incident. The instructions that she had given to the female workers including the Plaintiff would have been only minimal. In other words, the female workers and the Plaintiff were very much left to exercise their own discretion and common sense in combating the flooding problem that had arisen.

36. I would pause to note that it appears probable that had Cheung taken upon herself to organize the work, the end result would nonetheless have been substantially the same as what had actually taken place. It is indeed difficult to see what instructions could have been given to the female workers including the Plaintiff.

37. I would also pause to note that not every shortcoming in the Defendant's system of work would establish the Defendant's negligence for the purpose of the Plaintiff's claim. If the Plaintiff had suffered electrocution upon entering Room 10 which was then flooded with water, then it is quite possible that the Defendant would be found to be negligent in failing to take adequate precautions for the safety of the Plaintiff. The evidence tends to show that there was insufficient precaution taken against the risk of electrocution. That however is not the Plaintiff's claim.

38. In short, the Plaintiff in order to succeed in her claim has to establish a failure on the Defendant's part that had caused her to sustain her shoulder injury. Causation has to be established.

39. I accept that shortly after discovering the burst pipe situation, Cheung went downstairs to make a telephone call to the management company Synergis to request them to switch off the mains of the flushing water supply. She had to go downstairs to make the telephone call as it was the policy of the Defendant to forbid the use of mobile phones in the Centre.

40. I accept that at the early stage of the incident, Cheung had also advised the old folks inside Room 8 to stay inside to avoid slipping down in the flooded corridor. It is not in dispute that several old folks were inside Room 8 as the incident unfolded. The evidence shows that the old folks did not entirely pay heed to Cheung's admonition.

41. I accept that at the early stage of the incident, Cheung had also asked To to stay behind to help. Cheung had also called Yu Yuk Yip ("Yu"), another female worker, who lived nearby but was not on duty at the time, to come to the Centre to help.

42. The evidence shows that Cheung had gone away from Wing A of the 1st Floor a number of times to the Ground Floor to, inter alia, make telephone calls to Synergis, during the course of the incident. When she was not otherwise engaged, Cheung also took part in sweeping the water on the 1st Floor of the Centre.

43. It is not in dispute that a number of things were used to combat the water flow. These include brooms, sweepers, large towel blankets and a suction machine. There were also rubber gloves and boots provided.

44. The evidence relating to the brooms is sketchy. They were nylon brooms from what I heard of. It is probable that they were no different from the ordinary nylon brooms one would commonly see on display for sale in supermarkets and markets.

45. The evidence relating to the towel blankets is also sketchy. It is probable that they were ordinary large towels. The towels were put on the floor to block the flow of water.

46. The water sweepers were said to be tools like those gas station attendants would use to wipe clean the windshield and windows of vehicles, albeit bigger in size and having longer handles.

47. There was a power operated water suction machine. It was put to use for once only at the beginning stage of the incident though it was again put to use towards the end. The reason is that the machine would cease to function when it has taken in about 80% of the capacity of its container. The water would then have to be drained away before the machine would restart. That would take 15-20 minutes.

48. The Plaintiff had demonstrated in Court how she had used a broom to sweep the water away. Her right hand was in front of her body at a higher position and her left hand was in front of her body at a lower position, as if clutching onto the handle of the broom. Her knees were slightly bent and her body leaning slightly forward. She moved her hands as if she were sweeping with a broom from the left side to the right side of her body.

49. The Plaintiff said that she had been using the broom and the water sweeper alternatively. I consider it improbable that she had been standing at the same spot, maintaining the same posture and repeating the same monotonous motion throughout the period when she tried to control the water flow. Different motion and different postures engage the use of different sets of muscle of the body. It is common sense.

50. I pause to note that sweeping water with a nylon broom is not an inherently hazardous activity. Nothing in the Plaintiff's demonstration shows that she had applied the broom in a manner that is out of the ordinary so that it would have been obvious to those around her to see that her action is likely to result in injury.

51. The Plaintiff had not demonstrated how she had used the water sweeper. I cannot by any stretch of imagination figure out how using the water sweeper to sweep the water away can be an inherently hazardous activity.

52. There is no evidence that the Plaintiff had used the water sweeper in a manner that is likely to result in her shoulder injury.

53. The Plaintiff said she had worked non-stop trying to control the water flow in the Wing A corridor. She said that the water level would rise when the sweeping was slowed down. It had come to be as much as about 6 inches deep. Apart from that, there is scant evidence on how much force she had to apply to complete a sweeping action and the tempo of her action. It cannot be that the work was leisurely. On the other hand, I am not prepared to find that she had worked herself to a frenzy.

54. The sketch shows that towels were being placed at the entrance of Room 8 which was occupied. It would appear that the idea is to prevent water coming into Room 8. Towels were also placed along the entire width of the corridor from Room 12 on one side to Room 11 on the other side. It would appear that the idea is to prevent the water to flow beyond that section of the corridor.

55. The evidence shows that the water coming out from Room 10 was thus contained within a section of the Wing A corridor and then guided or swept towards the exit to the staircase between Rooms 10 and 12, and made to flow down the staircase.

56. In the process, Yeung and To were working all the time with the Plaintiff at different positions in the vicinity of Rooms 7, 8, 9 and 10. Yeung, To and the Plaintiff were doing the same things during the period from about 6:30 pm to about 7:30 pm.

57. The Plaintiff said that she was positioned at the entrance to Room 8. That is at variance with Cheung's evidence. I prefer the Plaintiff's version. This is a matter of little significance.

58. Cheung said that some time after she made the first telephone call to Synergis, she called Synergis again to enquire why the water was still coming out from the burst pipe. She was told that even after the mains were switched off, the flow of water would still continue for some time as it would take time for the water already collected in the pipes upstairs to be drained away.

59. At about 7 pm, Cheung found out that the flow of water had still not reduced and she called Synergis the third time. She was given the same answer. Cheung then had to go to the Ground Floor of the Centre to dispense medicine to the inmates of the Centre and so she went about performing that duty.

60. According to Cheung, at about 7:18 pm, Yu came back to the Centre to work together with the Plaintiff, Yeung and To to control the flow of water.

61. It was at about 7:25 pm that a staff of Synergis came by and who noting the water flow still had not slowed down, said to Cheung for the first time that they might have turned off the wrong mains. I find that it was probable that Synergis had turned off the wrong mains.

62. I do not consider the mistake of Synergis to be reasonably foreseeable. In other words, the prolonged outflow of water from the burst flushing water pipe was not reasonably foreseeable. But for the mistake committed by Synergis, the outflow of water from the burst pipe would have ceased significantly earlier than what had in fact taken place.

63. At about 7:30 pm, Cheung asked the Plaintiff to go downstairs to the canteen to do the dishes. At that time, the Plaintiff had developed blisters on her hands. Cheung then became aware of the blisters.

64. I pause to note that up to this point in time, there is nothing in the manner in which the Plaintiff had carried out her work that would make the risk of injury to her left shoulder reasonably foreseeable, nor is the risk of such injury reasonably foreseeable from the duration of her work.

65. Apart from the blisters on the Plaintiff's hands, of all the things that had taken place, I can see nothing to cause Cheung to be concerned about the Plaintiff's physical well-being up to that point in time. Should the blisters put Cheung on enquiry? Is Cheung at fault in not asking if the Plaintiff needed a rest? Is Cheung at fault in not arranging the Plaintiff to take a rest - without the need for the Plaintiff to take the initiative to ask for it?

66. I pause to note that as a lay person, I would have difficulty to correlate blisters on one's hands to the over strenuous exercise of one's shoulder. An inexperienced tennis player may develop blisters on his hand after playing for just half an hour because he has applied a wrong grip of the racket. Improved his grip then he may go on playing for hours without developing any blisters. Blisters may have very little to do with the amount of and the force one applies in physical exercise. It may have more to do with one's grip.

67. Medical evidence may supplement the correlation between blisters on one's hand and an over exercised shoulder. But, there is no such medical evidence before me.

68. Up to 7:30 pm, Yeung and To had worked for the same length of time as the Plaintiff doing the same job. None complained of any muscle pain. It is difficult to see how a shoulder injury is reasonably foreseeable from the work.

69. In the circumstances, I am not prepared to find fault on the part of Cheung in not asking the Plaintiff if she was feeling tired to the extent that she needed a rest. The Defendant through Cheung had to exercise reasonable care. But it is not unreasonable for Cheung not to enquire with the Plaintiff if she needed a rest.

70. A fortiori, I consider that it is not unreasonable for Cheung not to arrange for the Plaintiff to take a rest. The Defendant had no reason to believe that the Plaintiff needed one.

71. In Court, the Plaintiff told me that her shoulder and neck were both painful when she was sent to do the dishes. The medical evidence before me does not record any complaint of neck pain until about 31 August 2004 although the complaint of shoulder pain came earlier - about 9 days after the incident.

72. The Plaintiff did not dispute that at the time when she was sent to do the dishes by Cheung, she had not informed Cheung of the pain she had in her shoulder and neck. According to the Plaintiff, she did not then raise the complaint as the pain caused by the blisters on her hands consumed her full attention. I do not accept that. I am not prepared to find that the Plaintiff was actually experiencing any pain in her shoulder (or in her neck) at the time although I am prepared to find that she was feeling tired.

73. However, I am not prepared to find that the Plaintiff herself felt tired to the extent that she needed a rest. Tiredness comes in different degrees. There are situations where it is reasonable and perfectly safe for an employee to continue working despite feeling tired. There are situations where it is unreasonable and hazardous to require an employee to continue to work when he/she feels tired. Each case turns on its own merits. In the present case, I am not persuaded that the Plaintiff's situation falls within the latter category.

74. I accept that there was no training given by the Defendant to the Plaintiff as to inform her precisely that she was entitled to take a rest when she felt tired. I also accept that there was no training or guidelines given to the Plaintiff that she should ask her supervisor for time to take a rest when she felt tired. I also accept that there was no training given to the Plaintiff as to inform her what degree of tiredness would justify her asking her supervisors to grant her a rest. I do not consider the absence of such training or instructions from the Defendant to be an unreasonable omission.

75. There was certainly no rule imposed by the Defendant that the Plaintiff would be required to continue to work regardless of how tired she was. Nor am I prepared to find that there was a tacit understanding mutually shared by the Plaintiff and the Defendant that the Plaintiff should not be entitled to any rest when there was pending work to do. I am not prepared to find that the Defendant had subject the Plaintiff to a harsh and unduly rigorous working regime whether in general or with specific reference to the incident in question. It is not a case in which the Plaintiff, being docile, was all along subject to a harsh and oppressive working regime imposed by the Defendant, so much so that, being conditioned to never say "no" to her supervisors, she had no real choice to exercise her common sense and judgment to decide when she would need a rest in the course of her work.

76. The Plaintiff gave evidence to the effect that she believed that it was quite out of the question for her to ask Cheung to grant her some rest on that specific occasion. I am prepared to find that Cheung had to deal with an emergency situation at the time and she probably did expect the other female workers including the Plaintiff to be also making extra efforts to combat the problem. Cheung is not a manual worker but she herself had also taken part in sweeping the water away. But even in such a context, I am not prepared to find that Cheung would have ruled out the possibility of granting the Plaintiff some rest if a request were made. I am not prepared to find that the Plaintiff actually believed at the time that she would be refused any rest. I rather find that the Plaintiff had not asked for a rest because she did not feel or consider that she needed one.

77. It is not in dispute that the blisters on the Plaintiff's hands were treated and Cheung asked the Plaintiff to go downstairs to do the dishes, at about 7:30 pm. The Plaintiff did as told. Yeung, To and Yu remained where they were on the 1st Floor to continue to control the water flow. According to the Plaintiff, the flooding situation was still quite serious at the time.

78. It may be that had the Plaintiff taken that rest, she would not have sustained her shoulder injury. It is not shown that it is likely the result of this lack of rest that the Plaintiff got her shoulder injury.

79. I consider that it is not unreasonable for Cheung to tell the Plaintiff to continue to work at 7:30 pm. The Defendant was also obliged to take care of the needs of the old aged inmates and had to rely on its employees to carry out such duties.

80. I also accept that at about 7:30 pm, Cheung had called Synergis again and was told that they already had the correct mains switched off. By 8 pm, the flow of water from the burst pipe had reduced significantly.

81. According to the Plaintiff, she finished doing the dishes at the Ground Floor canteen at about 8:15 pm. She then came back to the 1st Floor and noticed that the other female workers were clearing up the water that still remained there. They were applying the water suction machine again.

82. The Plaintiff helped in cleaning up using towels to wipe dry the place. She worked until about 9 pm when her shift ended.

83. So it would appear that the Plaintiff's work that evening falls into 3 stages: (1) from about 6:30 pm to 7:30 pm, she was sweeping away the water; (2) from about 7:30 pm to 8:15 pm, she was doing the dishes; and (3) from about 8:15 pm to 9 pm, she was clearing up the water on the floor. As observed earlier, I consider that the Defendant is not at fault up to the end of stage (1) when Cheung told the Plaintiff to continue to work. For substantially the same reasons, the Defendant is not at fault in requiring the Plaintiff to work at stages (2) and (3).

84. I do not consider that the Defendant should be faulted for not having arranged more manpower to carry out the work that evening. I consider the number of staff that the Defendant had deployed to deal with the situation to be reasonable and adequate.

85. Negligence is not proved. I do not consider that the Defendant was in breach of the statutory duties under the OSHO. In any event, causation for the Plaintiff's left shoulder injury has not been established.

After the incident

86. Further detailed discussion of the Plaintiff's injury and treatment is not called for in the circumstances. However, for the sake of completeness and to make a finding in relation to the alleged neck injury, the following will be noted.

87. The Plaintiff returned to work on 20 April 2004 and continued to work. On 28 April 2004 she attended the Chinese Medicine Department of the Kwong Wah Hospital for treatment. She was referred to the Tuen Mun Hospital Staff Clinic and diagnosed to have left shoulder muscle pain on 29 April 2004. She attended a follow-up on 3 May 2004 and was diagnosed as having a sprained left shoulder. Between 6 May 2004 and 7 June 2004, the Plaintiff attended 9 follow-ups at the Staff Clinic.

88. The Plaintiff received her physiotherapy treatment at the Pok Oi Hospital from 6 May 2004 to 10 June 2004 for altogether 11 sessions. Then there was a break.

89. She received her occupational therapy treatment from 2 June 2004 to 7 June 2004 for 2 sessions. Then there was a break.

90. The Plaintiff was suggested to have a work trial and she returned to work on 14 and 15 June 2004. She then visited the Staff Clinic again on 16 June 2004 complaining of increased shoulder pain after she had resumed work.

91. The Plaintiff consulted a private orthopaedic specialist on 16 June 2004 whose diagnosis is that she had got a sprain left shoulder.

92. The Plaintiff visited the Kwun Tong Occupational Health Clinic of the Labour Department on 16 August 2004.

93. The Plaintiff received further occupational treatment from 31 August 2004 to 3 November 2004 for 8 sessions. The related Occupational Therapy Report contains the earliest documented complaint of pain in her neck, made on 31 August 2004. The report also says that her condition became static on 3 November 2004.

94. On 5 November 2004, the Plaintiff visited the out-patient clinic of the Department of Orthopaedics & Traumatology of the Tuen Mun Hospital. She received follow-up treatments thereafter.

95. On 7 December 2004, the Plaintiff attended the Accident & Emergency Department of Tuen Mun Hospital for treatment.

96. The Plaintiff received further physiotherapy treatment from 29 December 2004 to 1 April 2005, for 20 sessions.

97. The Plaintiff was assessed by the Ordinary Board for employees' compensation on 3 May 2005 with the finding of *"left shoulder injury resulting in residual pain"* and a 1% loss of earning capacity. A review on 17 August 2005 confirmed the finding.

98. The Joint Medical Report compiled specifically for this claim and based on an examination of the Plaintiff on 16 January 2006 and the earlier medical records gives the diagnosis as *"left shoulder pain and stiffness; status post injury".* It contains divergent views on the Plaintiff's condition. Dr. Au Ka Kau opined that the Plaintiff had sustained soft tissue injury during work at the incident in question. Dr. Lee Po Chin opined that there was no definite injury to the left shoulder. He opined that such soft tissue pain could occur in persons of the Plaintiff's age after strenuous use of the left shoulder but that such pain could also occur spontaneously at her age.

99. On balance, I accept that the Plaintiff has sustained a shoulder injury in the course of her work during the incident in question. I do not accept that she sustained any neck injury on that occasion. I have doubts as to whether the Plaintiff has been malingering and exaggerating her condition. I see no need to have that resolved here. The fact remains that she did sustain a left shoulder injury during work. That is already unfortunate for her. Further, she had contracted cancer and had undergone an operation in November 2005 with subsequent chemotherapy. She deserves the sympathy of the Court.

100. But that is not to say that I should find fault on the Defendant's part to give her compensation. She will get her employees' compensation. Her present claim however fails.

Orders

101. The Plaintiff's claim is dismissed. There be an Order Nisi that the Plaintiff do pay the Defendant's costs of this action with Certificate for Counsel, to be taxed if not agreed. Unless there is an application to vary this Order Nisi, it will become absolute in 14 days.

# (R. Cheung)

# **Deputy District Judge**

Representation:

Miss Anna Saing, instructed by Messrs. Tso Au Yim & Yeung, for the Plaintiff

Miss Selina Lau, instructed by Messrs. Tsang, Chan & Wong, for the Defendant