#### DCPI 1323/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1323 OF 2009

BETWEEN

|  |  |
| --- | --- |
| SINGH CHAMKAUR | Plaintiff |
| and |  |
| RICHARD ETHAN LATKER trading as SINO-INDIAN TRADE ENTERPRISES | Defendant |

Coram : Deputy District Judge K. H. Hui in Court

Dates of Hearing : 15 and 16 May 2012

Date of handing down of Judgment : 31 May 2012

## JUDGMENT

*Introduction*

1. This is a personal injury claim.

*Background*

1. The Plaintiff (“Mr. Singh”) was employed by the Defendant (“Mr. Latker”) as a general worker.
2. On or about 15 June 2006, Mr. Singh worked at No.1 Pak Fa Lam Road, Sai Kung, New Territories, Hong Kong (“the Workplace”). The Workplace was the residence of Mr. Latker and his family. While working, Mr. Singh sustained injuries at his left foot by fallen bricks (“the Accident”).
3. Mr. Latker denied liability. In his Defence, he claimed that he was in France on the day in question. There was no such accident as alleged by Mr. Singh. He stated that Mr. Singh sustained injury in an accident when Mr. Singh took his vespa motorcycle for a joy ride.
4. In DCEC 796 of 2007, Mr. Singh claimed against Mr. Latker for employee compensation in respect of the Accident. Mr. Latker also disputed liability and raised the same defence as aforesaid. HH Judge Chow found that Mr. Singh was injured during the course of his work. The Court of Appeal dismissed the appeal of Mr. Latker in CACV 270 of 2009.

*Application and Appeal on 14 May 2012*

1. Before I deal with the evidence, I think it is better for me to mention briefly the application and appeal on 14 May 2012 (the day before the trial of this Action). I have already given my oral reasons for the decisions immediately after the hearing and thus I shall be very brief here.
2. Mr. Latker applied to stay/adjourn the trial on the ground that he had made a report to the ICAC on various matters involving the Accident, this Action and the conduct of Mr. Singh’s solicitors etc. The ICAC is making investigation. He submitted that the ICAC may be able to find some material evidence to show that, inter alia, Mr. Singh was making a false claim. I rejected his application because there is nothing before me to show that there is a real likelihood that the ICAC will dig up something material or the investigation will in any way affect the trial.
3. Apart from the said application, Mr. Latker also appealed against the Order of the Master made on 5 July 2011 (the Order is at p48 of the Bundle). Under the Order, directions were given in relation to the filing of witness statements, admission of medical reports of government hospital and calling of medical evidence etc.
4. I also dismissed the appeal because there is no acceptable reason for the long delay in taking out the appeal. Further, there is no meritorious ground of appeal.

*Application on 15 May 2012*

1. Before commencement of the trial, Mr. Latker asked for an adjournment so that he could appeal against my decisions made on 14 May 2012 and/or to prepare his case and call witnesses. I dismissed the application as there is no prospect of success in relation to the intended appeal and that he has ample time to prepare for the trial.
2. Mr. Latker thought that it was meaningless to stay behind in the Court because he was not entitled to call any witness since he has failed to comply with the Unless Order granted by the Court on 2 November 2011 concerning the filing of witness statements and medical evidence etc (the Unless Order is at p44 of the Bundle).
3. I have explained to Mr. Latker that he is still entitled to cross examine the witnesses and make submission. Yet, Mr. Latker chose to leave the Court.
4. Therefore, the trial proceeded in the absence of Mr. Latker.

*The Plaintiff’s Case*

1. There are 2 witnesses. Mr. Singh and his wife.

Mr. Singh

1. He worked for Mr. Latker as a causal labourer. His daily wages is $350. He has his pay bi-weekly.
2. At around 4:15pm, he was working at the Workplace. He was instructed by a mason working there to transport bricks to a platform next to a wall. In the course, he was told to hurry up with his work.
3. The platform was about 6 ft from ground level. It is an elongated wooden board about the size 5 ft x 1 ft placed on the second top rung (one end on each side) of two wooden “A” shape ladders.
4. Mr. Singh told the Court that he worked alone. He first used a wheel barrow to transport bricks from their storage place to somewhere near the platform. He then tilted or toppled the barrow to unload the bricks onto the ground. He repeated this process until he was told to place the bricks onto the platform.
5. According to Mr. Singh, the bricks are made of cement and sand. Each of them is around 7cm x 20cm x 5.5cm by size and about 400g in weight.
6. He picked up 4 to 5 bricks from the wheel barrow. He then stacked up the bricks in his hands, one on top of the other (with the 7cm x 20cm side touching each other), before he placed the brick column onto the platform. The entire brick column rest on the platform without any part protruding from the edge of and not supported by the platform.
7. At that time, there was a bucket of water and a bucket of cement on the platform.
8. After placing the brick column onto the platform, he intended to pick another brick column. He was standing in front of the platform though not facing it directly. He turned his waist to his right (without the need of moving his feet) and bent down. Before he could pick up anything, the brick column fell down and hit his left foot causing injury. There was a lapse of 4 to 5 seconds between the time the brick column was placed onto the platform and the time they fell down. As a result, Mr. Singh sustained injury.

Mrs. Singh

1. She was notified by her husband about the Accident and she went to Kwong Wah Hospital. She helped to translate what she was told by Mr. Singh to the doctor.
2. She told the doctor that Mr. Singh was hit by some bricks while at work.

*Injury sustained and treatments*

1. After the Accident, Mr. Singh was then sent to Kwong Wah hospital for treatment.
2. He was diagnosed to have a fracture of his left second toe. Dr. Cheung, of the Accident and Emergency Department of Kwong Wah Hospital, in his medical report dated 13 December 2006 (Bundle p69), stated that there was fracture at the head of proximal phalanx of the left second toe.
3. Mr. Singh was discharged on the same day after treatment.
4. He was referred to the Occupational Therapy Department for assessment and training. The first treatment session was on 2 August 2006. Upon his request, the treatment programme terminated as from 25 September 2006.
5. Mr. Singh received physiotherapy from 4 August 2006 to 15 September 2006. He defaulted the treatment sessions thereafter. When Mr. Singh was last assessed on 15 September 2006, it was reported that his condition has improved by 70 to 80%. Full active plantarflexion, dorsiflexion, inversion and eversion of his left ankle were noted. He can fully squat and stand on his left foot for 10 seconds, the same as his right foot.
6. Dr. Choi Sum Hung (“Dr. Choi”), the Plaintiff’s expert, in his medical report dated 13 February 2012, stated that X-ray back in 2006 revealed fracture base of proximal phalanx of the left second toe. The fracture fragment has angulated and the fracture line extended into the left second metatarsal-phalangeal joint. Further, deformity of the medial cuneiform bone with increased in space between the base of first and second metatarsal was also noted.
7. Dr. Choi noted that Mr. Singh complained of pain over his left foot on walking. The pain got worse with walking up/down stairs or slope. He can only tolerate standing or walking for 10 to 15 minutes. On rainy days, Mr. Singh experienced increase in pain and had to walk with the aid of a stick. He found it difficult to squat and could not run even for a few steps.
8. Physical examination revealed local tenderness on palpation over the second metatarsal-phalangeal joint. The ranges of motion of the metatarsal-phalangeal joint are: Flexion 20° and Extension 40° (right foot); Flexion 20° and Extension 30° (left foot).
9. X-ray in 2012 showed that the previous fracture at the base of proximal phalanx of his second toe has healed with residual depression in the articular surface. However, the joint space of the second metatarsal-phalangeal joint has not narrowed. The deformity over the medial cuneiform bone and the increased gap over the base of the first and second metatarsal remain unchanged. The alignment of the mid-tarsal joint is normal in the lateral X-ray.

*Discussion and Analysis*

1. The issues are (i) whether Mr. Latker is liable for breach of contract and/or negligence and/or breach of statutory duty; and (ii) if so, quantum of damages.

Liability

1. At all material times, Mr. Singh was working alone and there was no one nearby. The mason was not working on the platform.
2. Mr. Singh demonstrated, with his arm stretched, that he can reach as high as 6.5 ft. It means that he would have no difficulty in placing the brick column onto the platform which was only 6 ft from ground level. The bricks are only 5.5 cm thick. The brick column is therefore around 22cm to 27.5cm (8.7 inch to 10.8 inch) in height depending on whether there were 4 or 5 bricks. The total weight is at that most 2 kg (400g x 5). There should be no difficulty for Mr. Singh to place the bricks onto the platform.
3. I have considered the evidence of Mr. Singh very carefully. I note that he said there were only 4 to 5 bricks on the platform but not 20 odds as he mentioned in his witness statement. I also note that Dr. Cheung in his medical report dated 13 December 2006 stated that Mr. Singh “was hit by a falling machine whilst on duty” (Bundle p69). I do not think these two matters affect his credibility. He is now 72 years of age and the Accident took place 6 years ago. I fully appreciate that Mr. Singh may not be able to recall each and every details of the Accident. In relation to the medical report, it could well be a mistake on the part of the medical doctor.
4. In the absence of any contradicting evidence, I see no reason why I should not accept the evidence of Mr. Singh. However, it is my finding that, bearing in mind the size and weight of the bricks together with the manner they were stacked up, the bricks were not just slightly titled but so serious that they became unstable and fell. Apart from this, I accept the evidence of Mr. Singh.
5. Mr. Yuen, Counsel for the Plaintiff, submitted that Mr. Latker is liable for the Accident under the employment contract or common law duty of care because there was no system of work or the system of work was unsafe: Mr. Singh received no instruction or training to carry out his work; there was no supervision; no one was helping Mr. Singh in his work; Mr. Singh worked under time pressure; and no safety warning was given.
6. Counsel submitted that if there was apparatus such as tray or container to carry or hold the bricks, there would not be any falling off. If Mr. Singh was told to place the bricks one by one onto the platform, the Accident would have not happened.
7. In *Cathay Pacific Airways Ltd v Wong Sau Lai [2006] HKCFA 58*, Bokhary PJ said:-

*“13. Employer’s liability is said in Street on Torts, 11th ed. (2003) at p.266 to be “one of the most highly developed areas of the law of negligence”. And a safe system of work - it is observed in Winfield and Jolowicz on Tort, 16th ed. (2002) at p.298, para. 8.13 - is “the most frequently invoked branch of the employer’s duty [and] also the most difficult to define”. In a similar vein, a proper system is said in Markesinis and Deakin’s Tort Law, 5th ed. (2003) at p.569 to be “probably the most important, but ill-defined, aspect of the employer’s duty”. These statements are of course made in regard to the position in Britain. But similar statements can justifiably be made in regard to the position in Hong Kong.”*

*14. The practice of judges and academics alike is to speak in open-ended terms of the matters that system includes. I know of no attempt to provide anything like an exhaustive list, and doubt that any such attempt would prove successful. In Speed v. Thomas Swift & Co. [1943] KB 557 at pp 563-564 Lord Greene MR said:-*

*“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 in 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. His Lordship further said that:-

*“24. Of course the duty of care owed by employers to employees at common law is a single duty to take reasonable care for his employees’ safety. This is so even though it is convenient to think of the duty as involving the provision of safe co-workers, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision and (where called for) adequate training. As Lord Keith put it in Cavanagh v. Ulster Weaving Co. Ltd [1960] AC 145 at p.165, “[t]he ruling principle is that an employer is bound to take reasonable care for the safety of his [employees], and all other rules or formulas must be taken subject to this principle”.”*

1. Is there any system of work in this case? I think the evidence is crystal clear. There is no system of work. Mr. Singh was simply left to his own to carry out the work as assigned.

1. Placing something overhead seems simple and straightforward but always creates a risk. Therefore, a proper and safe system should be in place to ensure the bricks will not fall down. In my view, stacking the bricks up to 2 or 3 levels only is an effective measure. Putting the bricks into a tray or container as suggested by Mr. Yuen can also prevent the danger of stacking up brick columns.
2. In my ruling, Mr. Latker was in breach of the implied term of contract as well as common duty of care both under common law and the statute. He is liable for the Accident.

*Quantum of Damages*

1. Mr. Singh was born on 1 February 1940. He was 66 years old at the time of the Accident. He is now 72 years of age.
2. He worked around 25 days per month and thus his monthly income was around $8,750.
3. In the witness box, Mr. Singh complained of left foot pain when walking on stairs and when weather changes.

PSLA

1. Mr. Yuen, Counsel for the Plaintiff, relied on the following authorities:-
2. *Yan Sung Bik Yu v Liu Ching Man t/a Wa Fai Marble Co* (DCPI 423/2006, Deputy District Judge Ko (as he then was), 19 March 2008);
3. *Wong Yuk Foon v Nice Property Management Ltd* (DCPI 1025/2006, HH Judge Lok, 8 November 2007);
4. *Tsang Ching Fei v Mo King Guo* (DCPI 2136/2006, HH Judge H.C. Wong, 2 April 2008); and
5. *Cheng Muk Ping v Chan’s Machine Engineering Co Ltd* (DCPI 932/2007, HH Judge H.C. Wong, 20 October 2008).
6. In *Yan Sung Bik Yu*, the plaintiff was hurt by a broken piece of marble when he was moving a large piece of marble onto a trolley. There was fracture of the second metatarsal bone. A total of 220 days sick leave was granted. PSLA award: $180,000.
7. In *Wong Yuk Foon*, the plaintiff slipped and fell onto the ground. There was fracture of the left little toe. Sick leave was granted for 48 days. PSLA award: $150,000.
8. In *Tsang Ching Fei*, the plaintiff’s left big toe was hurt by a fallen brick wall. There was an operation for open reduction, screw fixation and k-wire fixation on his left big toe. 4 months’ sick leave was granted. PSLA: $180,000.
9. In *Cheng Muk Ping*, the plaintiff was hurt by the push arm of a bulldozer and sustained a Lisfranc fracture on his right foot second metatarsal. He received an operation of open reduction and internal fixation. His foot was put in cast for 6 weeks. Sick leave for almost 6 months was granted. PSLA: $180,000.
10. Mr. Yuen submitted that the Court should award $90,000 under this head.
11. I have considered the injuries sustained by Mr. Singh, the treatments he has received, the present incapacity he is still suffering and Counsel’s submission. I am of the view that an award of $90,000 is fair and reasonable.

Loss of Pre-Trial Earnings

1. Mr. Singh did not resume work after the Accident.
2. Mr. Singh was granted sick leave for 139 days. I therefore only award damages for 139 days as claimed. It means $51,083 ($350 x 139 x 1.05) including MPF.

Medical and Travelling Expenses

1. Mr. Singh claims for $2,680. While this claim is not fully supported by receipts, I am of the view that the amount is reasonable because Mr. Singh had attended various treatment sessions.
2. I accept his claim and award $2,680 under this head.
3. The total award is $98,063 after giving credit to the employee compensation.

|  |  |
| --- | --- |
| PSLA | $90,000 |
| Pre-trial loss of earnings | $51,083 |
| Medical and travelling expenses | $2,680 |
| Less ECC Award | ($45,700) |
| Total: | $98,063 |

*Conclusion*

1. Judgment be entered in favour of the Plaintiff with damages assessed at $98,063. The Plaintiff is entitled to interest at (i) half judgment rate for special damages from the date of accident and (ii) 2% on general damages from date of writ to date of judgment and thereafter at judgment rate until full payment.
2. I also make a costs order nisi that the Defendant to pay the Plaintiff’s costs of this Action including all costs reserved to be taxed if not agreed with Certificate for Counsel. The Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. This order nisi shall become absolute unless there is application to the otherwise within 14 days after handing down of this Judgment.

( K. H. Hui)

Deputy District Judge

Mr. Carl Yuen, instructed by Messrs. Jal N. Karbhari & Co., for Plaintiff

Defendant: in person, absent