## DCPI 1465/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1465 OF 2009

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| BETWEEN | KHAN IRRAM | Plaintiff |
|  | and |  |
|  | WAI HING ENGINEERING COMPANY LIMITED | Defendant |
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Coram : Deputy District Judge Grace Chan in Court

Dates of hearing : 10, 11 & 12 October 2011

Date of submission : 21October 2011

Date of handing down Judgment : 4 November 2011

# JUDGMENT

***Background***

1. The Plaintiff (“**Mr. Khan**”) was employed by the Defendant ("**Wai Hing**") to work as a general labourer in its construction sites. In the afternoon of 4th August 2006, he had an accident during work, as a result of which he sustained injuries mainly to his left ring finger. He now claims damages against Wai Hing in the sum of $237,852.
2. Before I go into the background of the case, it needs to point out at this stage that Mr. Khan alleges in the Statement of Claim that the accident happened at *Pacific Street*, Happy Valley. It turns out that the accident actually took place at *Percival Street*, Causeway Bay. Mr. Chan, Counsel for Wai Hing, has very fairly confirmed that he would not take issue on this. It is thus not in dispute that the accident took place at Percival Street, Causeway Bay (“**the Site**”).
3. By way of the Statement of Claim and witness statement, Mr. Khan claims that on 4th August 2006, he, together with another Pakistani co-worker called Mr. Iftikhar (“**Mr. Iftikhar**”), was driven by Leung Ping Wah (“**Ah Wah**”), the foremen of Wai Hing, to a building at the Site. They were instructed by Ah Wah to dig up a ditch at the Site, so as to expose the electric cables located beneath the pavement. The electric cables were to be replaced by Hong Kong Electric the following day.
4. After the soil was dug out and the electric cables exposed, Mr. Khan had to place some wooden boards to cover the ditch for the pedestrians to walk over. For that purpose, Mr. Khan had to cut the wooden boards to the required size by using an electric cutting machine provided by Wai Hing (‘**the Yellow Machine**”). The Yellow Machine consists of a yellow handle and a knife-like blade (measuring approximately 5” (long) x 1” (wide) x 0.3 cm (or 0.12”) (thick). It is pleaded in the Statement of Claim that the Yellow Machine was meant for cutting metal and electric cables only, but not suitable for the purpose of cutting wooden boards. When Mr. Khan was cutting the 3rd wooden board, the blade of the Yellow Machine suddenly broke. The broken piece of the blade hit his left finger(s) and he sustained injuries to three ulnar fingers of his left hand as a result.
5. Mr. Khan alleges that the accident and his injury were caused by the breach of contract of employment, negligence and/or breach of duty on the part of Wai Hing. In particular, Mr. Khan alleges that Wai Hing has failed to provide a suitable tool, such as a manual saw or electric circular saw, for him to cut the wooden boards.
6. By its Defence, Wai Hing admits that on the day in question, Mr. Khan had an accident during work and sustained injuries as a result, but does not admit that the accident happened in the way as pleaded in the Statement of Claim. It puts Mr. Khan to strict prove his case. Further, it avers that Mr. Khan has told Ah Wah a different story: while Mr. Khan was cutting the wooden board with the Yellow Machine, he lost balance and fell. As a result, his left hand touched the ground and sustained minor injury.
7. Wai Hing therefore denies that the accident was caused by any negligence, breach of contract or breach of duty on its part. It claims that the accident was caused solely or contributed to by the negligence on the part of Mr. Khan.
8. On quantum, Wai Hing disputes the items of PSLA and loss of earning capacity, but agrees the amount on pre-trial loss of earnings and special damages. Wai Hing also asks for credit to be given to a sum of $5,760 paid to Mr. Khan by Wai Hing on 5th September 2006 in relation to this accident[[1]](#footnote-1).

***Issues***

1. In view of the background set out above, the core issues for determination at trial are :
   1. How did the accident happen?
   2. Was the accident caused by the negligence or breach of duty on the part of Wai Hing? Was there any contributory negligence of Mr. Khan?
   3. What is amount of damages payable under PSLA and loss of earning capacity?
2. It is perhaps helpful to say now that Mr. Khan is the only witness for his case. Mr. Iftikhar, whom Mr. Khan says witnessed the accident, was not called to give evidence. Mr. Khan explains that he does not want to trouble his friend with his own personal matter. Ah Wah is the only witness for the Defendant. But he was not present at the time of the accident. In fact, nobody from Wai Hing’s side witnessed how the accident happened. What Wai Hing or Ah Wah knew about the accident was allegedly told by Mr. Khan.
3. Mr. Khan is thus the only witness in this case who can give direct evidence on how the accident happened. The whole case, therefore, hinges on the credibility of Mr. Khan.

***Pleaded Case vs. Oral Evidence***

1. ***The Discrepancies***
2. In an alleged work-related personal injury claim where an employer is not present at the time of the accident and avers that it does not know how the accident happens, the credibility of the employee is likely to be strenuously challenged by the employer. This is exactly the situation here.
3. Mr. Chan, Counsel for Wai Hing, tests the credibility of Mr. Khan by cross-examining him in virtually each and every aspect of the accident. But in view of the chronology of important documents and oral evidence of Mr. Khan as set out below, it is not difficult to understand why Mr. Chan has done so.
4. Medical records of Ruttonjee Hospital dated 5th August 2006

In a medical report prepared by Dr. Kan Pui Gay, consultant of A & E Department of Ruttonjee Hospital, it is recorded that Mr. Khan told the doctor that his left ring finger was *hit by a hammer*.

1. Witness Statement of Mr. Khan dated 4th September 2009

Mr. Khan described in paragraph 13 therein that [the Yellow Machine] was not suitable to cut through wooden material. He had to use some pressure/force to cut the wooden board as “[he] was cutting the wooden board by placing it’s [its] one end *at the edge of the curb stone*, the *blade broke* and the *broken pieces hit my ring finger* of my left hand.”

(c) Medical report of Dr. Chun Siu Yueng dated 3rd June 2010

Dr. Chun was engaged as a joint single medical expert on quantum. Mr. Khan brought his own interpreter, Ms. Neena, to see Dr. Chun on 27th May 2010.

Dr. Chun recorded in paragraph 3 of his medical report that Mr. Khan said when he was using a cable cutting machine to cut a wooden plank, the cutting blade broke. *The Yellow Machine fell down and hit his left hand* at a height of 1 foot. The Yellow Machine was 4-5 kg in weight and it hit against the ground (concrete) resulted in injury to his left hand fingers on the ulnar 3 fingers.

1. Statement of Claim dated 30th June 2010

Nine months after Mr. Khan’s witness statement was prepared and signed, or, less than a month after Dr. Chun’s medical report was prepared, the Statement of Claim was prepared and filed. The following facts were pleaded in paragraph 5:

“In order to cut the wooden boards the Plaintiff had to place them over *the edge of the curbstone* and apply force to the cutting device [the Yellow Machine] during the cutting process. Whilst he was cutting one of the boards the *blade* *of the cutting device broke and the broken pieces stuck the ulnar fingers* of his left hand causing him injury, loss and damage”

1. Oral evidence in trial (10th & 11th October 2011)

Mr. Khan says in his oral evidence that *he did not place the wooden board on the edge of the curbstone*. He demonstrates by gesture that there was a wall to his right hand side at the material times. *He leaned one end of the wooden board against the wall* at an angle. He rested the other end of the wooden board on ground and used his left foot to secure the position of the wooden board. His left leg was bent to an angle of 90 degrees. His right leg was stretched backwards and was bent down to an angle but without resting on the ground.

He did not place the wooden board horizontally in order to cut it because there was simply no sufficient work space for him to do so.

He held the Yellow Machine somewhat like holding a pistol: he gripped the handle of the Yellow Machine in his right hand. His left hand was placed under his right hand at the middle part of the Yellow Machine where the blade joined with the handle (“**the “x” point**”)[[2]](#footnote-2). Then, he pulled the trigger to start the Yellow Machine. He had to exert force with his body weight onto the Yellow Machine in order to cut the wooden board because the blade stuck with the wood.

While cutting, the *blade broke at the “x” point* into *two* pieces: one remained in the Yellow Machine and the other stuck in the wood. He at first says that *no piece of the blade shot out to hit with his left finger(s)*. But after he was referred to the relevant paragraphs of his witness statement and Statement of Claim, he changes to say that he is not sure if it was the *blade* or the *ground* or the *edge* that hit his left finger(s).

1. ***Radical Departure or Mere Modification***
2. Mr. Chan is adamant that Mr. Khan has given a wholly different version on the cause, location, manner and circumstances of injury in court, which does not tally with his pleaded case at all. The oral evidence, Mr. Chan submits, is a radical departure from the pleadings and Mr. Khan cannot rely on this new version of event described in his oral evidence. On this front, Mr. Chan refers me to the case of *Poon Hau Kei v Hsin Chong Construction Co. Ltd, Taylor Woodrow International Ltd (Joint Venture)*, FACV 18/2003, where the Court of Final Appeal reversed the decision of the CA but approved the principle in Ma JA’s (*as he then was*) judgment below (CACV 167/2002) :

“40. In circumstances where the version of events as pleaded or advanced by a party is found not to be accurate or true, and another version is held to represent the true position, a court must be careful when asked to make a finding of liability (or some other legal consequence) based on this other version. Before attempting to do so, the court must first be satisfied that the *issue has been properly* *put* before it and identified so that the *other party becomes fully aware* of the case he has to meet. This is usually done by the matter being made clear *in the pleadings*. Next, the court must also be satisfied that the ‘new version’ is one that the *other party has been given a full opportunity to deal with*. Both elements must exist before a court can then proceed to make a finding of liability or some other legal consequence based on the ‘new version’. There may of course be other considerations as well, but these two are usually the most important.

1. In dealing with the situation I have just identified (which is the position in the present case), the court may ask itself questions such as:-

(1) Is the so-called ‘new version’ a *radical departure* or *merely a variation, modification or development of an issue* that is already before the court? and

(2) Would the other party’s *preparation or conduct of the case* have been *different* if the “new version” was the one that it had originally come to the court to meet?”

1. Mr. Massie for Mr. Khan, too, relies on *Poon Hau Kei* (CFA). His submission, if I understand him correctly, is of two folds. First, he submits that while he concedes Mr. Khan is not a very good witness, it is far from a case where the oral evidence is a racial departure from the pleaded case. He argues that Mr. Khan has been consistent all along in saying that he was cutting wooden boards by using the Yellow Machine when the accident took place; that the blade broke when he was exerting force on the Yellow Machine; that the Yellow Machine was not suitable for wood-cutting. Mr. Massie says that the discrepancies, such as the location of the accident (i.e. outside the building as in the Statement of Claim vs. inside the entrance of the building as in the oral evidence), are *just variations of the circumstances* of the accident.
2. Second, Mr. Massie argues that what the CFA says in *Poon Hau Kei* is substantially this: though the plaintiff’s version of falling down from a ladder was not accepted by the court below, the court below should still hold the defendants liable anyway because the *defendants had pleaded an alternative case* of the plaintiff’s falling down from a light trough. The defendants had prepared for and made submission on this alternative case; thus *no prejudice* was caused to the defendant in the circumstances. Mr. Massie submits that here in our case, even if I believed in the oral evidence of Mr. Khan (as opposed to his pleaded case), there is no prejudice caused to Wai Hing because it has pleaded in its Defence that it has no idea as to how the accident happened anyway.
3. With respect, I do not agree with Mr. Massie that the discrepancies between the pleaded case and the oral evidence of Mr. Khan are mere variations of the circumstances of the accident. They cover such factual aspects of this case as how Mr. Khan placed the wooden board immediately before the accident; what actually hit his left finger(s) which caused the injuries; whether his left finger(s) was hit by the broken piece(s) of the blade of the Yellow Machine or not. As can be seen from paragraph 13 (b), (d) and (e) above, Mr. Khan at first claims in his witness statement and then the Statement of Claim that (1) the accident took place when the wooden board was placed on the curbstone and that (2) the blade broke and its broken piece hit his left fingers. But in his oral evidence, he changes to say that (1) the wooden board was *not* placed on the curbstone but leaned against the wall; (2) the blade broke but did *not* hit his fingers. The oral evidence later changes again to the effect that he is *not sure* if it was the blade or the ground that hit his left fingers.
4. In considering any inconsistencies, I do remind myself that as the accident took place some 5 years ago, it is understandable and in fact expected that memories to minute and trivial details of the accident may easily be forgotten or mixed up; leeway must be given to that. But I have to say that the inconsistencies here between the witness statement/Statement of Claim and the oral evidence relates to the *basic and* *material* factual aspects of the case which are so fundamental to the core issue of this case, namely, how the accident happened. Such material facts, in my view, must and should have been within the own personal knowledge of Mr. Khan at all material times, despite the lapse of time. It would be inherently implausible for Mr. Khan to forget or mix up with such facts.
5. Here, a passage quoted from the judgment of Ma JA (*as he then was*) in *Poon Hau Kei* (CA) (correctness was not doubted in the CFA) may be useful:

“44. … In an action for personal or fatal injuries, *the way an accident has occurred is a material fact that has to be pleaded*, if nothing else to inform the other side of the case he has to meet at trial. As to the function of a properly particularised pleading: see Hong Kong Civil Procedure 2002 Volume 1 at paragraph 18/12/1. Certainly, the plaintiff should have made clear from the outset when opening his case that this was his true case. In case it is thought that this is a mere pleading point, it is not. The whole direction of the case and the 1st defendant’s conduct of it would have been quite different had the trial proceeded on the basis of the light trough version. Before us, Mr Barretto sought leave if necessary to amend the Statement of Claim once more to plead the light trough version of events. As I have said, the fundamental objection to his case is not a matter just of pleadings.” (emphasis added)

1. Coupled with this, one must not overlooked the undisputed fact that Mr. Khan’s witness statement and the Statement of Claim were translated to him by an interpreter (being a clerk to Mr. Khan’s solicitors) way back in 2009 and 2010 respectively when memory to the accident must be clearer and more vivid than in the trial. Mr. Khan has confirmed the contents therein by way of the Statements of Truth. Ample opportunity was available to Mr. Khan there and then to correctly describe how the accident happened and if it was the blade or the ground that hit against his left finger(s). If what Mr. Khan says in court was the truth, it would be hard to understand why he approved of and confirmed his witness statement and the Statement of Claim in the content as they appear now before this Court. It would equally be hard to explain why he did not take the opportunity to clarify or amend the details when the respective witness statement or Statement of Claim was explained to him.
2. Besides, no plausible explanation is provided by Mr. Khan to explain the above stark contrast between his Statement of Claim and witness statement on one hand and his oral evidence in court on the other hand. His attempt to resort to the reason of language barrier cannot be sustained, as the Statement of Claim and the witness statement were translated to him by an interpreter. This by itself discredits the evidence of Mr. Khan to the result that I have grave doubt in my mind as to the truthfulness of his pleaded case and his oral evidence.
3. Pausing here, I should point out at this stage that at the close of Mr.

Khan’s case, Mr. Massie applies to amend paragraph 5 of the Statement of

Claim[[3]](#footnote-3) in order to, as Mr. Massie submits, put in place the oral evidence with the pleaded particulars of the Statement of Claim. I rejected the application after hearing submission from both parties. Be that as it may, I must say the very fact that this application was made lends every support to my finding that Mr. Khan’s oral evidence does substantially depart from his pleaded case, so much so that Mr. Massie deemed it necessary to apply for amendments.

1. In view of the above reasons, I take the view that the discrepancies between Mr. Khan’s pleaded case and his oral evidence is a radical departure but not mere modifications from his pleaded case.
2. ***Any Prejudice to Wai Hing***
3. On the other hand, I am not with Mr. Massie that there was no prejudice caused to Wai Hing if I was to accept the new version given by Mr. Khan in his oral evidence. I agree with Mr. Chan that the orginal pleaded case of Mr. Khan shows that it was a case of *blade-injury by reason of the unsuitability of the Yellow Machine*. Based on this, Wai Hing prepared and adduced evidence as to whether the Yellow Machine was in fact broken and on the suitability of the Yellow Machine for cutting wooden boards[[4]](#footnote-4). The oral evidence, however, reveals that the injury was *not* or might *not* be caused by the breaking of blade of the Yellow Machine. The oral evidence also reveals *for the first time* factual allegation that there was insufficient working space or unavailability of a work bench on which the wooden board can be secured, thus forcing Mr. Khan to lean the wooden board against the wall (as opposed to placing it horizontally).
4. It is true that the Statement of Claim has pleaded for Wai Hing’s breach of various heads of Section 6 of the Occupational Safety and Health Ordinance, Cap. 509 (“**the Ordinance**”) including Wai Hing’s failure to provide a safe work system. However, in my judgment, this is just a “shotgun approach” which can be seen in almost all work-related accident claims. What is vital here is that *no* positive facts are pleaded in the Statement of Claim or mentioned in the witness statement of Mr. Khan to substantiate on the “safe work system” allegation. Wai Hing is thus not pre-warned to prepare and adduce positive factual evidence on this point, such as the exact size of the ditch to be dug; exact area and dimension of the Site and of the entrance of the building in question. In this sense, I think Wai Hing would suffer prejudice if I was to rely on the new version in the oral evidence.
5. In view of the above analysis and a clear material departure from his pleaded case, I would conclude that Mr. Khan’s pleaded case is not supported by his oral evidence. He fails to show me that the accident happened and injuries sustained by him in the way he alleges in his pleadings. His claim must fail in the circumstances.

***Credibility of the Oral Evidence***

1. If I was wrong on the above analysis, should I find for Mr. Khan basing on the oral evidence of Mr. Khan given in the trial?
2. *Poon Hau Kei* (CFA) reversed the judgment of CA below and found for the plaintiff because the defendants therein had pleaded an alternative case, which the trial judge accepted and found as facts of the case. But here, Wai Hing has *not* pleaded an alternative case. This is also the stance of Mr. Massie, for he submits in paragraph 14 of his written closing submission that the “Defence have no alternative case or contrary evidence of their own as to how this accident occurred”.
3. I am thus left with the only alternative, i.e. to assess if the oral evidence of Mr. Khan, though different from his pleaded case, should be accepted in proving how the accident happened and in establishing fault on the part of Wai Hing.
4. Let me say from the outset that I do not find Mr. Khan a reliable witness. I find his oral evidence inconsistent and constantly shifting. Solely on the question of how the accident happened and what actually injured his finger(s), Mr. Khan has given the following different versions at different stages of his oral evidence:
   1. In the 1st day of trial before lunch, when Mr. Khan was cross-examined by Mr. Chan on the cause of his injury, Mr. Khan replied that it was the *“x” point of the Yellow Machine* that hit his finger(s). He went on to say that the “x” point in fact hit three of his left ulnar fingers at different degree. When he gave the answers, he was confident and firm;
   2. However, the above answers are flatly contradicted and discredited later by the oral evidence of his own. After a few questions from Mr. Chan, Mr. Khan changed to say that when he exerted pressure on the Yellow Machine to cut the wooden board, the blade broke and his finger(s) came into contact with the *cement slab* [of the ground] which has pointed/sharp edge. When Mr. Chan, probably to avoid any doubt or misunderstanding to the question, asked Mr. Khan again what his left hand came to contact to have the injury. Mr. Khan confirmed again it was the *ground*;
   3. Mr. Chan then asked about the blade. Mr. Khan said that though the blade broke into two pieces, *none* of the pieces shot out and *none* of the two pieces came into contact with his fingers. Mr. Khan was at that time very firm with his answers.
   4. But, after lunch, when Mr. Khan was referred to his witness statement, in particular paragraph 13 (where it says that the blade broke and the broken pieces hit his left ring finger), he conveniently changed his evidence yet again to say that he could not tell if it was the *blade* or the *floor* or the *edge* [of the curbstone] that hit his finger, because he was taken aback by the accident.
5. Another clear example of inconsistencies relates to the position of the wall in the Site. At the first part of the cross-examination, Mr. Khan tells me that he was *facing* the wall at the time of the accident. Later, when asked again, he confirmed that the wall was *in front of* him at the time of the accident. This piece of evidence is, however, flatly contradictory to the demonstration made by Mr. Khan when he was asked to show by gesture how he cut the wooden board at the time of the accident. In the demonstration, he changed to claim that the wall was *on his right.*
6. These different versions of answers (coupled with the manner Mr. Khan gave them) give me an overall impression that Mr. Khan is making up his evidence as he goes along in the trial. The answers are only thought out as and when he is answering the questions. When pressed hard with an answer on why there are such discrepancies, or, where he cannot explain why his oral evidence does not match with his witness statement, he conveniently resorted to the excuse of language barrier, which I refuse to accept. In this regard, I repeat what I have said in paragraphs 20 and 21 above.
7. Further, I am of the view that in answering questions under cross-examination, Mr. Khan is not always straightforward and at times evasive. He is particularly evasive when he was asked about matters relating to what tools were available to him for cutting wooden boards. The following is an obvious example:

*Q*: At the moment you were injured, you were using the yellow machine, right?

*A*: Yes.

*Q*: Only the yellow machine?

*A*: Yes. *But I would say that they had the other tools.* But what I used was the yellow machine.

*Q*: What other tools do they have?

*A*: I was given the yellow tool to work with.

*Q*: Just now, you said there are other tools. What are they?

*A*: I was referring to the company and where the company is.

1. The immediate impression I got from the above answers is that Wai Hing had other tools for cutting wood but Mr. Khan used the Yellow Machine only. This evidence is, by itself, a clear and stark departure from the original allegation of Mr. Khan that he was not given a choice on the type of tool. Having revealed that Wai Hing had other tools, Mr. Khan did not expand on the details of the tools when he was asked to do so. The last two answers stated above show clearly that Mr. Khan is not giving a direct answer to a simple question. He is selectively evasive to answer questions which may not be to his advantage.
2. The only conclusion I can arrive at, in view of such incredible and inconsistent evidence of Mr. Khan, is that he is not a reliable and truthful witness. I refuse to believe in his evidence at all.

***Facts Recorded in Medical Reports/Notes***

1. That said, I also wish to say something on the alleged discrepancies between what Mr. Khan told the government doctor or Dr. Chun Siu Yueng (single joint medical expert) of one hand and his oral evidence of the other hand. This is because both Mr. Chan and Mr. Massie have spent quite some time on the topic in their closing submission.
2. Mr. Chan for Wai Hing tries to attack the credibility of Mr. Khan by referring me to the medical report prepared by A & E Department of Ruttonjee Hospital (see also para. 13 (a) above) (“**the Hospital Report**”). The Hospital Report shows that Mr. Khan was injured *by hammering* and that *only his left ring finger* was injured; there is no record that his left middle and little fingers were injured at all. Mr. Khan says that he in fact had explained to the doctor by simple Cantonese and body sign that he was injured by a machine. He said that there must be some misunderstanding by the doctor of what he meant.
3. It is not disputed by Wai Hing that Mr. Khan went to Ruttonjee Hospital alone without an interpreter. Given his language barrier and heavy workloads of the attending doctors at government hospitals, it is not incredible that the attending doctor in question (1) might have misunderstood what Mr. Khan said or gestured by hand signs and (2) might not have recorded in details as to what caused the injuries of Mr. Khan. In all fairness to Mr. Khan, I give no weight as to the alleged discrepancies between Mr. Khan’s oral evidence and the content of the Hospital Report in so far as the *cause of the injury* is concerned.
4. However, in so far as the *description of injuries* is concerned, I take a different view. While I recognize that it is likely that there may be some kind of communication problem, be it in words or hand signs, between the attending government doctor and Mr. Khan, I do not think one will seriously doubt the professional observation and judgment of an attending doctor on the injuries of a patient. Suffice for me to point out here that the attending doctor in question is in the rank of a consultant, which means that he should be a very experienced and senior-ranking doctor. If what Mr. Khan tells me in Court was the truth, i.e. both his left middle and little finger had *visible* swell (which lasted for a few days after the accident); his left middle finger had *scratches* below the fingernail; the swell of all 3 ulnar fingers had become *prominent* the following day after the accident, it would be inherently implausible and against common sense that the attending doctor would not have noticed the swell and the scratches and recorded in the medical notes. The fact that the alleged swelling and scratches is not recorded in the medical notes of the attending doctor tends to show more likely than not that Mr. Khan is exaggerating his injuries, in particular to his middle and little fingers, in the trial. This again proves that Mr. Khan is not an honest witness.
5. Mr. Chan also tries to attack Mr. Khan’s credibility by referring to the discrepancies among Mr. Khan’s oral evidence, his witness statement and what he allegedly told Dr. Chun Siu Yeung in the medical examination on 27th May 2010 (See paragraphs 13 (b), (c) and (d) above). The discrepancies concern, inter alias, the time of the accident; whether the Yellow Machine fell down to hit his left hand; the type of transport he took back home after the accident and the time he left the Site.
6. Mr. Massie submits that Dr. Chun is an expert on quantum only. He is not an expert on liability and surely, his role is not to comment on how the accident happened. Since Dr. Chun is not called to give evidence in the trial, it is unfair to Mr. Khan for Wai Hing to comment or rely on such alleged discrepancies.
7. I agree with Mr. Massie, but only to the extent that Dr. Chun is not an expert on liability. That said, I remind myself that I should not, and in fact will not, jump to the conclusion that Mr. Khan is lying by simply comparing Dr. Chun’s records of what Mr. Khan allegedly told him about how the accident had happened with the oral evidence of Mr. Khan himself in Court.
8. However, one must not lose sight of the fact that Dr. Chun’s report was explained to Mr. Khan by his solicitors after the same was prepared. If any factual description therein is not correct, opportunity was avail to Mr. Khan to correct or clarify the same through his solicitors there and then. Yet nothing of that sort was ever done. The fact that such correction or clarification was never requested or done shows that it is more likely than not that Mr. Khan is making up the factual circumstances of the accident, thus resulting in yet another different version of events given to Dr. Chun. Again, this proves Mr. Khan is not a witness who is worthy to believe in.

***Fault of Wai Hing***

1. **Broken Blade & Unsuitable Tool**
2. Mr. Khan has failed to prove, on the balance of probabilities, that the accident happened in the way he pleaded and that he had sustained his injuries as a result of breaking of the blade of the Yellow Machine. His oral version of how the accident happened, if there was ever a confirmed version, is also rejected by me because his credibility cannot stand the test of trust-worthiness.
3. On the other hand, Ah Wah gives evidence to the effect that (1) there was a manual saw on board his vehicle; (2) Mr. Khan, after arriving at the Site, went to Ah Wah’s vehicle (on which the tools were kept) to pick the tools himself, including the Yellow Machine; (3) after he returned to the Site, Mr. Khan told him that while he was cutting the wooden boards with the Yellow Machine, he got to bend his body. When he nearly finished cutting the wooden board, he lost balance and fell forward. His finger was cut by the edge of the ditch near the ground level; (4) when he later collected the Yellow Machine after the accident, no damage was found on the blade of the Yellow Machine. In fact, the Yellow Machine was in use after the accident.
4. In my view, Ah Wah gives evidence in a straightforward manner. He appears to me to be frank and un-avoiding. His evidence is consistent and unshaken during cross-examination.
5. Mr. Massie submits to me in his closing submission that the evidence of Ah Wah, in so far as what Mr. Khan had told him about the accident is concerned, “supports and does not distract from what the Plaintiff says about the accident in his evidence”. It is thus eminent from Mr. Massie’s submission that he accepts the evidence of Ah Wah on this point. However, one should take note from the evidence of Ah Wah that Mr. Khan *never* referred to or mentioned about the breaking of the blade to Ah Wah. Bearing in mind that the breaking of the blade is all along alleged to be the triggering factor causing the injuries (which Mr. Massie accepts in his closing submission), it remains unexplainable why Mr. Khan did not mention about the blade and its breaking to Ah Wah at all in the first available opportunity to complain. The more likely answer is: the blade did not break at all during the accident.
6. Looking at it from another angle, Ah Wah says in both his witness statement and in his oral evidence in chief that when he collected the Yellow Machine on the day of the accident, he did not find any damage or breaking of the blade. This part of his evidence is not challenged in the cross-examination. I accept this evidence of Ah Wah without reservation.
7. For the same reasons aforesaid, I reject Mr. Khan’s evidence that Wai Hing did not have a manual saw at the material time. I repeat my observations set out in paragraph 33 above. Further, common sense tells that a manual saw is not an expensive tool. Given Wai Hing is a construction company which mainly takes digging work sub-contracted from Hong Kong Electric, it is inherently implausible and contrary to common sense that Wai Hing does not have a manual saw at all.
8. In view of above analysis, I conclude that Ah Wah’s evidence set out in paragraph 49 above should be preferred and believed. I accept and find that the blade of the Yellow Machine did not break during the accident; and that the accident and the injuries sustained by Mr. Khan on the day in question were not caused by the breaking of the blade. Since the blade of the Yellow Machine did not break during the accident, I conclude that there was insufficient evidence from Mr. Khan to show that the Yellow Machine was not a suitable machine for cutting wood.
9. I accept and find that even if (and only if) the Yellow Machine was unsuitable for cutting wood, there was a manual saw on board Ah Wah’s vehicle on the day of the accident for Mr. Khan to use. Yet when Mr. Khan went to pick his own tools at the vehicle, he picked the Yellow Machine instead. In my judgment, where a safe tool has been provided, an employee, who decides to take an unsafe one, even for purposes relating to the discharge of his duties, has only himself to blame. Thus, Mr. Khan by not choosing the manual saw but the Yellow Machine was on a frolic of his own, for which Wai Hing should not be held liable.
10. **Unsafe work system**
11. There remains for me to deal with the alleged failure to provide a safe system of work on the part of Wai Hing.
12. It is pertinent to note again that Mr. Khan has never put forward any positive facts in his Statement of Claim or his witness statement to substantiate the allegation of unsafe work system. The alleged facts came out only during the course of his oral evidence when he, for the first time, told this Court that he leaned the wooden board against the wall, but not placed on the curbstone, in order to cut the same. He was thus cross-examined as to why he did not place the wooden board horizontally to cut it. The explanation provided by Mr. Khan was that no work bench was provided to him; and that there was insufficient space made available to him at the Site, as people were walking to and fro. He was therefore forced to lean the wooden board against the wall when cutting it.
13. However, Ah Wah says in his evidence that Mr. Khan could have made use of the pavement just outside the entrance of the building in question, warded it off by the barriers brought to the Site, used the pavement bricks that were dug up as supporting base and then placed the wooden boards horizontally on top of the bricks and cut the wooden boards. Ah Wah further says that Mr. Khan could have asked his co-worker, Mr. Iftikhar, to assist in holding or securing the position of the wooden board when cutting the same.
14. Mr. Massie submits to me that by virtue of the statutory duties imposed under Section 6 of the Ordinance, an employer has a heavy onus to provide for the safety of its employees. It is the employer, not the employee, who must devise a safe system of work. However, Mr. Massie agrees that the statutory breaches are no difference to the allegation of negligence.
15. It needs to point out here that it is the common grounds between the parties that (1) Mr. Khan has, since 2004, worked for Wai Hing as a labourer. His main duties are to dig ditches and cover them with wooden boards. He has worked in more than 100 construction sites over between 2004 and 2006 (when the accident took place); (2) On the date of accident, two workers, being Mr. Khan and Mr. Iftikhar, were assigned by Ah Wah to dig a ditch in the passageway inside the entrance of a residential building of the Site and thereafter to cover the ditch with wooden boards; (3) Ah Wah did not divide the tasks between Mr. Khan and Mr. Iftikhar. They were to perform the tasks together; (4) Having placed the wooden board at an angle by leaning it against the wall, Mr. Khan did not ask Mr. Iftikhar to assist in holding firm the wooden board during the cutting process.
16. That said, I would accept the submission made by Mr. Chan that for a simple and straight-forward task, such as cutting wooden boards, where the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the employee on the spot.
17. In *Rashad Muhammad v Gurung Amrit Singh t/a Fewa Co*., HCPI 531/2009. Wright J at paragraph 23 of his Judgment citing Lord Oaksey in *Winter v Cardiff Rural District Council* [1950] 1 All ER 819:

“In my opinion, the common law duty of an employer of labour is to act reasonably in all 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 an employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foreman and workmen must exercise theirs*...” (emphasis added)

1. Wright J found that the employer in his case not liable under negligence or breach of statutory duty. On appeal, the learned Judge’s approach and decision was upheld by the Court of Appeal (*CACV 165/2010*).
2. In *Cheng Lung Fong v Mitoyo Hong Kong Ltd.* [2010] HKCU 994, having quoted Lord Oaksey in *Winter v Cardiff Rural District Council* (supra), A Cheung J (*as he then was*) has the following to say:

“19. A host of local cases are to the same effect: *Cheung Suk Wai v Attorney General*, PI 536 of 1996, 1 November 1996, Leong J; *雲淑莉對力根有限公司*, HCPI 1142/1996, 22 February 2002, Deputy Judge Lam; *Wong Tai Wai David v Hong Kong Cable Television Limited*, HCPI 541/2001, 13 August 2002, Deputy Judge Fung; *Liu Wai Leung v Asia Construction Company Limited*, DCPI 501/2008, 8 September 2008, Deputy Judge P Li. Of course, all these cases turned on their own facts, but they provided illustrations of the same principle that *for a simple and straightforward task, where the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the employee on the spot.*

…

21. In the circumstances of the present case, it is quite unnecessary to focus on the particular way the plaintiff chose to mop the cashier area (by lifting the mop head and turning it from left to right). *There certainly were different possible ways of mopping the cashier area. She chose a particular way to do her job and injured herself. That was unfortunate. However, the main point here is whether she could lay the blame for her injury on the employer*.” (emphasis added)

1. In my judgment, cutting wooden boards must be a simple task which can be seen in almost, if not all, construction work. There is nothing inherently dangerous in this task. Mr. Khan is an experienced workman in digging ditches and cutting wooden boards to cover the ditches. He has dug ditches and covered them with tailored-size wooden boards in over 100 sites over 2 years. The precise method that Mr. Khan would employ to cut the wooden boards would be determined by him as he carried out the particular task. It would not be unreasonable for Wai Hing to let Mr. Khan decide how to carry out this simple task of work. After all, the obligation imposed by the Ordinance on Wai Hing should not be an absolute one, but should be one of reasonableness and practicality. In *Ng Kong v Golden Caterers Ltd.* [2005] HKCU 171, it was held that:

“In approaching the question of whether there was any negligence or breach of the statutory duties here, it is important to bear in mind that the law does not require perfection. The employer is not an insurer of his employee’s personal injury. There is hardly anything in the world which could not be better done with the benefit of hindsight. *An employer who has exercised such care reasonably expected from a careful employer is not to be found liable to his injured employee* for negligence simply because after the event someone is able to make some extravagant suggestions of how things could be better arranged to avoid this particular accident.”

1. I take the view that Wai Hing has exercised all reasonable care in the circumstances by providing a manual saw and the Yellow Machine for Mr. Khan to choose from; by making available barriers for Mr. Khan to ward off the pavement to gain sufficient space for lying down the wooden board horizontally for the purpose cutting it; and by assigning a co-worker, Mr. Iftikhar, who could come to aid Mr. Khan if needed be. It would be erroneous to require Wai Hing to provide a work bench for wood-cutting on the Site given the relatively small scale of work and site in question.
2. ***How the Accident Happened***
3. In view of the above analysis, I accept and find that the accident happened in the following way.
4. Mr. Khan was given the manual saw and the Yellow Machine to choose from on the day in question. He chose the Yellow Machine. Finding out that the space then available inside the building of the Site was not sufficient for him to place the wooden board horizontally, he did not ward off the pavement outside the building in order to gain more space. Instead, he decided to place the wooden board at an angle by leaning one of its ends against the wall inside the building of the Site.
5. He then tried to secure the other end of the wooden board by his left leg, instead of asking for the assistance of his co-worker to secure the wooden board for him. He then started to cut the wooden board. But while cutting the wood and exerting force on it, he bent his body forward with none of his knee touching the ground.
6. Under such circumstances, it comes as no surprise that he would lose his balance easily. And this is exactly what happened in this accident. When he was about to cut off the wooden board, he lost balance himself and fell onto the ground and sustained injuries to his left ring finger.
7. The blade of the Yellow Machine did not break and this certainly is not the cause for the accident.
8. Therefore, I conclude that there was no failure at all on the part of Wai Hing in so far as negligence or breach of duty is concerned. I am satisfied that Wai Hing had taken all such reasonable precautions as were necessary. I regret to say that it is Mr. Kan’s own folic that has led to this accident and his injuries. The injury sustained by him was solely the result of his own negligent conduct.
9. I further repeat what I have said in paragraphs 54, 55 and 66 above.

***The amount of damages payable***

1. In case I was wrong on the question of liability, I shall consider the next issue of quantum. But I shall deal with it briefly.
2. **PSLA**
3. Mr. Khan was 22 years old at the time of the accident. He went to the A & E Department of Ruttonjee Hospital in the following morning after the accident. According to the Hospital Report, the distal phalange of his left ring finger was swollen with bruises. Bruise was found underneath the fingernail of his left ring finger. X-ray of the left ring finger detected a fracture at the distal phalange. He was discharged on the same day with analgesic drug. He was given sick leave from 5th August 2006 up to 19th August 2006 (15 days). He was asked to go back to the hospital for follow up but he did not turn up subsequently.
4. In his medical report of 3rd June 2010, Dr. Chun Siu Yeung points out that the facture at Mr. Khan’s left ring finger has healed in good condition. The pain and tender at the tip of the ring finger with hard contact is compatible with the residual of the healed fracture but is unlikely to be serious. Dr. Chun opines that Mr. Khan’s condition had long reached maximal medical improvement. No further treatment is required.
5. Mr. Khan claims that he still experiences discomfort and weakness over his left hand up to today. His grip power has reduced. He can no longer play cricket and volleyball after the accident. He asks for PSLA in the sum of $150,000 for the injuries caused to his left ring finger only.
6. Mr. Massie refers me to two cases in which PSLA of $120,000 was awarded: *Khan Zubair v Hung Kee Cleaning Envirnment Recycle Ltd*., DCPI 1514/2008; *Shah Junaid Ali v Yau Lee Galvanizers (Hot-Dip) Co. Ltd.* , DCPI 517/2008. Yet, Mr. Massie concedes that in both quoted cases, the extent of finger injury and scope of treatment received was more extensive than our Mr. Khan in this case. With that remarks, it is quite clear that a claim of $150,000 for PSLA is somewhat overstated.
7. Mr. Chan, on the other hand, says that an award of not more than $50,000 should be made for PSLA. He quotes me *Tse Parc Ki v Altantic Team Ltd. t/a Le Beaumont Language Centre*, DCPI 1981/2006, a case involving a 2 ½ years’ old child, which in my view, is not a reasonable comparable due to the age difference with Mr. Khan of our case .
8. Neither Mr. Massie nor Mr. Chan has quoted me good comparable cases on PSLA. Doing the best I can and after considering the injuries, treatment, residual disability and degree of impairment of Mr. Khan, I will award a mid-way figure between $120,000 and $50,000, i.e. **$85,000** for PSLA.
9. **Pre-trial Loss of Earnings & MPF**
10. The claimed sum of **$6,552** is agreed by Wai Hing. Accordingly, I shall make the award under this head as claimed.

1. **Disadvantage on the Labour Development**
2. It cannot be disputed that Mr. Khan has returned to work for Wai Hing one month after the injury. But Mr. Khan claims he was to a certain extent pressurized to resume duty, because one of the partners of Wai Hing called him and asked him to resume work after expiry of the sick leave. The partner told him that if he did not return work, Wai Hing would find somebody else to do his work. In the fear that he might lose his job, Mr. Khan reported duty upon expiry of the sick leave. But he was assigned lighter duties for the next 2 to 3 weeks.
3. Mr. Khan claims that as a result of the injuries and disabilities arising from the accident, he will be at a disadvantage on the labour market as compared with other able-bodied workers and will therefore suffer longer periods of unemployment. He thus claims $80,000 under this head.
4. According to Dr. Chun Siu Yeung, Mr. Khan should be able to resume work at the same job with minor pain at the left ring finger tip. The loss of earning capacity is assessed to be 0.5%.
5. Given Mr. Khan's ethnic background and his limited language skills, I am of the opinion that it will be difficult for him to find employment not involving manual labour. That said, I am satisfied that he would be subject to a disadvantage in the local labour market in that he may suffer longer periods of unemployment as a result of his injury. This is supported by the assessment of 0.5% loss of earning capacity by Dr. Chun, though I note that the percentage is relatively minimal.
6. That said, I take the view that a reasonable and fair award under this head of claim is a global sum of **$40,000.**
7. **Special Damages**
8. Wai Hing does not dispute the amount of special damages in the sum of **$1,300**. I will thus allow this sum in full.

***Summary on quantum***

1. If Mr. Khan succeeded on liability, the total amount of damages awarded would be (after giving credit to the sum of $5,760 received by Mr. Khan from Wai Hing) is:

|  |  |
| --- | --- |
| PSLA | $ 85,000 |
| Pre-trial loss of earnings & MPF | $ 6,552 |
| Loss of earning capacity | $ 40,000 |
| Special damages | $ 1,300 |
|  | $132,852 |
| LESS compensation already received by Mr. Khan | $ 5,760 |
| TOTAL : | $127,092  ======= |

1. Interest will be payable on PSLA at the rate of 2% per annum from the date of service of the Writ to the date of judgment, and on other special damages at half judgment rate from the date of the accident to the date of judgment.

***Conclusion***

1. In view of my judgment on liability, Mr. Khan's claims in this action are dismissed. I will make a costs order *nisi* that the costs of the action are to be paid by Mr. Khan to Wai Hing, to be taxed if not agreed, with certificate for Counsel. Mr. Khan's own costs are to be taxed in accordance with the Legal Aid Regulations.

Grace Chan

Deputy District Judge

*Mr. John Massie of Messrs. Massie & Clement (assigned by the Director of Legal Aid) for the Plaintiff*

*Mr. Chan Hei Ching instructed by Messrs. Lo, Wong & Tsui, for the Defendant*

1. It is not disputed by Mr. Khan that credit should be given to this amount of $5,760 when considering quantum of this case. [↑](#footnote-ref-1)
2. Mr. Khan has marked in exhibit P-1 the “x” point to indicate where his left hand was when he was holding the Yellow Machine. [↑](#footnote-ref-2)
3. The draft amendment to paragraph 5 of the Statement of Claim is: “In order to cut the wooden boards the Plaintiff had to place them at an angle against the wall near to ~~over~~ the edge of the concrete surrounding the ditch ~~curbstone~~ and apply force to the cutting device during the cutting process. Whilst he was cutting one of the boards the blade of the cutting device broke and a broken piece of the blade and/or the handle end of the device which still held the broken piece~~s~~ of the blade stuck the ulnar fingers of his left hand and/or caused it to strike against the edge of the concrete surrounding the ditch causing him injury, loss and damage.” [↑](#footnote-ref-3)
4. Reference can be made to paras 6 and 9 of the witness statement of Lueng Ping Wah. [↑](#footnote-ref-4)