# DCPI 1683/2005

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1683 OF 2005

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BETWEEN

## LI MEI YUNG Plaintiff

### and

EASTERN PACIFIC CIRCUITS (HK) LIMITED

formerly known as

WONG’S CIRCUITS (H.K.) LTD Defendant

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Coram : Her Honour Judge C.B. Chan in Court

Dates of Trial : 12th and 13th September 2006

Date of Handing down Judgment : 3rd November 2006

JUDGMENT

1. In this action the Plaintiff applies for common law damages for injuries suffered from an accident in the course of work and arising from work at 4:00 p.m. on 24 December 2002. The Plaintiff’s claim is that the aforesaid accident was caused by the negligence and/or breach of duty of statutory duty under s. 27 (1) and s. 30 (1)(2) of the Occupational Safety and Health Regulation (Cap. 509A), Laws of Hong Kong of the Defendant, and/or its employees or agents in the course of their employment.
2. It is not disputed that, the Plaintiff was born on 24 December 1957 and is now 47-year-old. The Plaintiff was employed by the Defendant as an operator and/or inspector. The Defendant works at the Inner AOI Department of the Defendant company at 2 Chun Yat Street, Tseung Kwan O Industrial Estate, Tseung Kwan O, Hong Kong (“the Premises”).
3. The Defendant called no evidence on the facts of the case and the Plaintiff’s evidence on how the accident happened is not contested.

Particulars of Negligence / Breach of Statutory Duty Pleaded

1. The Plaintiff pleaded inter alia the following particulars of negligence and/or breach of statutory duty on the part of the Defendant:
   1. Failing to take any or any adequate care for the safety of the Plaintiff.
   2. Failing to provide safe workplace and safe or adequate system of work, plant and equipment to the Plaintiff.
   3. Failing to provide safety plant, equipment and/or personal protective equipment, namely, trolley, which was so constructed or adapted as to be suitable for the purpose for which it was used or provided, to the Plaintiff that was suitable for the task in hand and to prevent the risk to which she was exposed in the above work.
   4. Failing to avoid the need for the Plaintiff to undertake the above manual handling operation which involved a risk for her being injured.
   5. Failing to train or instruct the Plaintiff as to how or how safely to undertake her work or otherwise to supervise her in the work which she was doing.
   6. Failing to warn the Plaintiff the dangers of working in the above circumstances or otherwise to prevent her from so doing.
   7. Exposing the Plaintiff to danger or trap and foreseeable risk of injury.
   8. Causing, permitting, requiring or suffering the Plaintiff to work as above when it was unsafe so to do.
   9. In the circumstances the Defendant, as an employer of the Plaintiff, failed to take any or any adequate care for the safety of the Plaintiff and exposed her to an unnecessary risk of injury.

Particulars of Permanent Injuries of the Plaintiff

1. The Plaintiff claims that she has continuous pain on her neck and back and the pain spreads to her whole spine and leads to her upper limbs numbness, especially during weather changed. Such pain also causes her to suffer headache. The pain at her neck and back also makes the Plaintiff unable to have prolonged sitting. After sitting for 15 minutes, she was required to change her position. As to walking on an uneven ground, she alleges that she has to walk more slowly than the average pedestrian because of the pain over her spine region. The situation turns worse when she walks upstairs and downstairs. She has to hold the handrails tightly for supporting her walking on the stairs.
2. The Plaintiff alleges that because of the pain, the Plaintiff worries about that such injuries could affect her job career. Eventually, the Plaintiff suffered from psychological problem and has attended the Psychological Department of Tseung Kwan O Hospital periodically.

The Plaintiff’s Evidence

1. The Plaintiff states that she was an AOI machine operator in the Defendant’s factory. The Plaintiff was to operate the machine to check circuit boards. The circuit boards were transported via the goods lift from the films department on the upper floor to the floor where she worked. The lift was 1.1m wide, 1.1m high, 1m deep. The Plaintiff was required by the Defendant to operate the AOI machine and attend to the goods lift at the same time. Whenever the lift buzzed, she was required to take the circuit boards out from the goods lift to her work station. She had to do everything in a hurry since she was told by the Defendant that the AOI machine has to be operated for 24 hours non-stop. She was told that the machine should not be left unattended. If a tray was used to contain the circuit boards inside the goods lift, she could have just pulled the tray out from the lift without herself getting inside the lift to retrieve the boards. If a trolley was used to convey the circuit boards inside the lift, she could have just pulled the trolley out from the lift easily and no lifting was necessary. If no trolley and no tray were available, she had to use both her hands to retrieve the circuit boards from inside the lift. In doing so she would have to get inside the lift while bending her back. On the day in question, the lift was conveying some 20 to 30 circuit boards of varying sizes and thickness. She estimated the weight of these to be 10kg. Some of the boards were stiff (series D boards) while some were soft (similar to exhibit D1). Those boards in the lift were stacked irregularly and no tray nor trolley was used. Those boards were placed far from the door frame of the lift and thus she had to stretch both her arms forward, with one foot stepping inside the lift and bending her back at the same time in order to retrieve the same. The Defendant has not supervised her as to how to retrieve the circuit boards from the lift. There was no colleagues to assist her retrieving the boards from the lift.
2. While the Plaintiff was taking out the circuit boards from the goods lift, she sustained injuries on her back and neck and which led both her arms to be without strength. As a result, the Plaintiff’s back and neck sustained injuries. She later attended the Accident & Emergency Department of Tseung Kwan O Hospital for medical treatment.

The Defendant’s Case

1. The Defendant disputes that the Plaintiff sustained injuries to her back and neck as claimed arising from the alleged accident. The Defendant also denies the particulars of negligence and breach of statutory duty by themselves, their servants and agents as pleaded by the Plaintiff.
2. In evidence the Defendant adduced the video footage in two VCD obtained upon the surveillance conducted by Elite (Commercial Services) Company at the Defendant’s instructions. The Report of Mr. Simon Ma related to the surveillance conducted on the Plaintiff is produced and is at page 451-471 of the Agreed Trial Bundle No. 2 (“BD2”). This Report contained a conclusion at page 5 thereof at page 470 of BD2 as follows:
3. During the observation on the above occasions, we observed Madam Li:-
   * + - * did shopping daily without showing difficulty
         * did not show difficulty on her neck movement while shopping
         * could turn her head in all directions without significant difficulty on her neck movement
         * could squat down in full position without significant difficulty on her back
         * could stand up easily without showing difficulty after squatting down.
         * could prolong shopping for about 2 hours without significant difficulty on her back

The Issues

1. (1) Whether the Defendant is liable in negligence and breach of statutory duty.
   * + 1. If the Defendant is liable, the quantum of damages to be awarded.

The 1st Issue

1. The stance of the Defendant as submitted by its Counsel is that, although an employer is under a duty to provide and maintain a safe system of work, to provide appropriate supervision and training, and to provide proper plant and appliances, the duty on the part of the employer is to ensure that the place and the process of work is reasonably safe, not to guarantee absolute safety. An employer is not required to baby-sit his employees and is entitled to leave certain tasks to them.
2. The Defendant’s Counsel submits that it is clear from the authorities that where the work in question does not involve any serious risk of injury, and is simple and non-complicated, it is up to the employer to leave the task to the employees.
3. The Defendant’s Counsel refers to several authorities. They are Wong Tai Wai David v. Hong Kong Cable Television (HCPI No. 541 of 2001). In this case, the plaintiff was a technician employed by the defendant. His duties included calling at the homes of prospective subscribers to the defendant’s cable television service and installing the decoder on the TV set. On 29 June 1998, the plaintiff was at the home of a subscriber. There was a 14-inch TV set on the floor and the plaintiff had to move it to a different place to do his work. The plaintiff asked the female householder to help, but she was on the phone and ignored him. So the plaintiff moved it himself. While moving the TV set, the plaintiff heard a snap sound and felt pain in the right wrist. He was subsequently diagnosed to have suffered from torn triangular fibro-cartilage complex in the right wrist. The plaintiff sued the defendant for negligence and claimed that the defendant should have provided supervision and training, and arranged extra manpower. The court accepted the defendant’s argument that lifting a 14” TV set was a simple and non-complicated task and that it was reasonable for the defendant to leave to work to the plaintiff.
4. The second case relied on by the Defendant’s Counsel is, ***Cheung Suk Wai v. AG*** ([1996] 4 HKC 288), the plaintiff was employed to sweep the parks. She needed to put the refuse into garbage bags and then transfer them to a refuse centre. She would swing the bags over the side of the four feet tall container. In April 1989, she sprained her back when swinging one of the bags. The plaintiff argued that the defendant had failed to put in place a programme of training and warning. Leung J (as he then was) found that no training or warning was required for the plaintiff’s work, which was simple and not dangerously heavy. At p. 295 of the report, Leung J referred to the often quoted judgment of Lord Oaksey in ***Winter v. Cardiff Rural District Council***:

“In my opinion, the common law duty of an employer of labour 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 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 foremen and workmen must exercise theirs …… 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 foreman or workmen on the spot.”

* + - * 1. The third case relied on by the Defendant’s Counsel is ***Ng Kong v. Golden Caterers Ltd*** (DCPI 1283 of 2004). This case involved a cook in a Chinese restaurant who in the course of taking a dish of steamed fish from the top level of a steaming cabinet twisted his back and suffered injuries. The top level of the steaming cabinet could only be reached by the plaintiff in the case if he held up his hands and raised his heels off the ground. After pulling the dish out from the upper shelf in the steaming cabinet with his hands raised above his head, the plaintiff in the case was about to turn his body around to put the dish on the table nearby. It was then that as he turned he twisted his back. There was a stool provided in the kitchen which the Plaintiff did not use. The learned Recorder Mr. Edward Chan SC found that there was no breach of statutory duty or common law duty of care in not giving the Plaintiff instruction as to how he should take the fish from the oven to the table and in particular what should be his body posture when moving the dish.
        2. The Plaintiff’s Counsel sought to distinguish the aforesaid cases from this particular case in that:

1. there was no time pressure faced by the plaintiff in those cases;
2. the plaintiffs in those cases were not required to lift a load from a confined area where a certain degree of crouching is inevitable;
3. the Plaintiff in the present case was required to retrieve 20 to 30 circuit boards of different sizes, different thickness and different texture;
4. the Plaintiff in the present case had to deal with another task (i.e. operating the AOI machine) at the same time.
   * + - 1. He relies on ***Lai Wah Wai v. Castco*** [1996] 2 HKC 44. In this case, the plaintiff was under pressure to work quickly. He injured his back while lifting a mould with a concrete. Liability was established against the defendant in that:-
5. it had not prohibited the workers from lifting the moulds with the concrete;
6. it had not ensured that workers would not lift the moulds with the concrete; and
7. it had not instructed the workers as to the safe posture in lifting the moulds.
   * + - 1. The second case relied on by him is ***Lai Kai Wah v. Hip Hing Construction Co. Ltd.*** PI No. 255 of 1996. In this case the plaintiff was instructed to move certain “threaded screws” (about 4kg) from a platform to another some 15 feet directly above on the same wall of formwork inside a construction site. No hoist or mechanical lifting device was available and the platforms were too narrow to allow the use of a ladder. No workmates could give him assistance at the time. While reaching up to place the threaded screws onto the platform above him, in twisting his body, he felt pain in his back.
         2. It was held that in the absence of proper instructions, mechanical aids, scaffolding and/or manual assistance, the plaintiff was not provided with a safe place or safe means of work.
         3. He submitted that as the Plaintiff in the present case, was required to lift some 20 to 30 circuit boards of varying sizes and thickness from the lift of restricted size, it is reasonably foreseeable that there would be a risk of injury when handling the same. The Plaintiff would have to have a good grip of the boards, particularly when they were not stacked neatly and she was under time pressure. The Defendant should have warned the Plaintiff of the risk.
         4. The Plaintiff’s Counsel further referred to ***O’Neill v. DSG Retail Ltd.*** [2003] ICR 222, where the Plaintiff claimed for damages for personal injuries alleging negligence and breach of regulation 4 (1) of the Manual Handling Operations Regulations 1992 by the defendant, a provision similar to s. 27 (1) and s. 30 (1)(2) of the Occupational Safety and Health Regulations.
         5. It was held that:-
8. for the purposes of the 1992 Regulations, there had to be a real risk, a foreseeable possibility, of injury, certainly nothing approaching a probability;
9. the “appropriate steps” included steps in training which the employer itself had recognized as being necessary to increase awareness of risk;
10. the defendant’s failure to train was a cause of the accident.
    * + - 1. He submits that as the Defendant had not done anything to assess the risk in the present case, it should be held to be in breach of statutory duty as pleaded.

Application to the Facts

* + - * 1. The undisputed facts of the case has been set out earlier. There is no dispute that the Plaintiff worked under a time pressure when she had to perform the duty of collecting the circuit boards from the lift to her working station. The circuit boards consisted of those that were stiff and those that were made from material that had metal on a flexible and floppy surface. A sample of the latter is submitted as exhibit and marked Exh. D1. Handling 20 or 30 of the circuit boards consisting of the stiff ones and the ones on a flexible floppy surface to take them out of a constrained space of the lift being 1.1m wide, 1.1m high and 1 m deep is not easy. On the day in question, these were not put on a tray and were left on the floor of the lift. Some were deep inside the lift. It meant that the Plaintiff had to stoop and extend her body and hands inside the lift to collect these 20 – 30 circuit boards in such a way that when taking them out those with a flexible floppy surface would not tear. Another difficulty was that they were all of varying sizes. On top of this, there was also a time constraint and time pressure as she could not leave her AOI machine unattended for long.
        2. I therefore am of the view that the facts of this case are to be distinguished from the facts in the authorities cited by the Defendant. In relation to the common law duty of the Defendant as employer towards the Plaintiff, I am of the view that the formulation of the law by Cheung J in ***Lai Wah Wai v. Castco Testing Centre Ltd.*** referred to above is applicable. This is at page 48F-I:

“The standard of an employer’s duty towards his employee is to see that reasonable care is taken; the scope of that duty extends to the provisions of safe fellow employees, safe equipment, safe place of work and access to it and a safe system of work. (Wilsons and Clyde Coal Co. Ltd. v English [1938] AC 57). A system of work is the term used to describe:

(1) the organization of the work;

(2) the way in which it is intended the work shall be carried out;

(3) the giving of adequate instructions (especially to inexperienced workers);

(4) the sequence of event;

(5) the taking of precautions for the safety of the workers and at what stage;

(6) the number of such persons required to do the job;

(7) the part to be taken by each of the various persons employed; and

(8) the moment at which they shall perform their respective tasks.”

* + - * 1. Related to the particulars of negligence of the Defendant, it seems to me that the Defendant had failed to provide a safe equipment, safe place of work and access to it and a safe system of work in the following:

(a) Owing to the size of the lift and the nature of the circuit boards being of different sizes and different types of surfaces, some being flexible and floppy having metal on a surface that could tear, others being stiff, putting 20 or 30 of these on the surface of this lift for the Plaintiff to pick up and take out of the which is a constrained space, lift in a short space of time, without putting these in a tray or on a trolley.

(b) To take these out in the constrained space and pressurized time makes it easy to sprain one’s back when the Plaintiff has to rush back to her work station.

(c) The Plaintiff ought to have a system of work whereby the circuit boards are put in a tray in the lift floor or on a trolley that could be pushed out of the lift easily.

* + - * 1. I find the Defendant liable in negligence and in breach of statutory duty.

# Quantum

* + - * 1. Having seen and heard the evidence of the Plaintiff, I have come to the conclusion that the complaints related to the symptoms of her injuries are grossly exaggerated. Her present complaints are stated in her witness statement which was adduced into evidence. She states that even though more than 3 years has elapsed since the accident, she still feels continuous pain at her lumbar spine region, especially her neck and back. The persistent pain would spread to her whole spine and leads to her upper limbs numbness and causes her difficulty to turn her neck. The pain also leads her to suffer headache. The lasting pain sometimes disturbs her sleep, especially during rainy days and during weather change. She has no alternative but to take pain killers most of the time to relief her pain.
        2. She further states that she found it very difficult to have prolonged sitting. She has to change her position frequently, say every 15 minutes otherwise she would suffer severe neck and back pain. The uncomfortable feeling also affects her when she is walking on even floor. As such her walking speed is slower than other pedestrians because of the pain over her spine region. She no longer carries heavy objects that cause inconvenience to her daily life as she has to take care of her family. Therefore, every time she goes to do her shopping she only buys small things.
        3. She told her medical expert Dr. Lau Hoi Kuen that her complaints were substantial and these are referred to by Dr. Lau Hoi Kuen in page 376 of the Agreed Trial Bundle. They include:

(1) Pain over the whole back

Both shoulders

Neck, back of her head up to the vertex

Left side of face

Left side of chest

Both upper limbs, more severe on the left side

Both lower limbs, more severe on the left side

The diffuse pain over her body is disturbing her sleep every night. The pain in her body and limbs is persistent and is increased by :

* Turning her head around
* Looking down
* Moving her limbs including walking slowly
* Prolonged sitting (for half an hour)

(2) Numbness of 4 limbs, neck and back, worst over both shoulders, hands (including all fingers) and feet (both dorsum and sole).

* + - * 1. However, upon examination, Dr. Lau found that in her back there was no swelling or deformity detected. No muscle spasm was felt. X-ray of the cervical spine revealed mild degenerative change, but there is no evidence of acute trauma such as fracture or disclocation. The disc spaces and the lordotic curvature are well preserved. X-rays of the lumbosacral spine reveal spondylolysis of the L5 vertebra. The disc spaces and the lordotic curvature in the lumbar spine are well preserved.
        2. Some of the conclusions of Dr. Lau the Plaintiff’s medical expert are that the Plaintiff was noted at the assessment to have positive Waddell’s inorganic signs for her neck and low back pain. This certainly represents exaggerated response to physical stress. This can be seen in patients suffering from chronic pain and does not necessarily suggest that she is exaggerating or malingering. Dr. Lau further states that the MRI of the Plaintiff’s cervical spine having excluded any compression of the nerve roots or spinal cord in the cervical spine, the generalized weakness and decreased touch sensation of her 4 limbs cannot be explained. He further states that orthopaedics-wise, the condition of the Plaintiff’s neck and low back should have improved. This is evidenced by the absence of muscle spasm over her neck and low back as well as the preservation of the lordotic curvature of the cervical and lumber spine as being shown up in the x-rays taken at this examination.
        3. Dr. Lam, the medical expert of the Defendant is more outright in his opinion in relation to the exaggeration of symptoms by the Plaintiff. He states in the last paragraph at page 19 of his Report at page 407 of the Agreed Trial Bundle that there were many signs of exaggeration, inconsistency and use of submaximal effort. He listed these out at page 20 of his Report. He compared that with the objective tests such as the upper limb reflexes, lower limb reflexes, measurement of the forearm girth, and measurement of calf gifth which were all normal. He further stated that radiological investigation was unremarkable and the normal lumbar lordosis was preserved.
        4. Dr. Lam concluded that there was no evidence of a significant pathology that would prevent Madam Li from resuming her pre-accident duties, and further sick leave was not justified.
        5. He concluded;

“Madam should have no difficulty to return to her pre-accident job. On the issue of sick leave, it should be noted that according to Madam Li’s treating specialist, Dr. Chan Chi Fai, Senior Medical Officer of Department of Orthopaedics and Traumatology of Tseung Kwan O Hospital, sick leave should be terminated on 5 August 2003. In fact, the medical evidences suggested that Madam Li should be able to return to her pre-accident job by 6 May 2003 (about 5 months after injury). Considering the relatively mild mechanism of injury, and the significant element of exaggeration in Madam Li’s case, the maximum period of sick leave should not exceed 6 months.”

* + - * 1. During the Trial, the two VCD of the surveillance referred to above was viewed. From the viewing, it is clear that the conclusion drawn by Mr. Simon Ma in the Surveillance Report at page 455 of the Agreed Trial Bundle 2 was correct. This is that the Plaintiff was clearly enjoying shopping outings with her friend. She could walk fast and in normal gait. She could climb up and down stairs normally without holding the handrail for support. She could do shopping alone without showing difficulty. She could carry loaded shopping bags after shopping and walking about 20 minutes without significant difficulty. She could read the products detailed descriptions in the supermarket without showing difficulty in her neck. She could move her head in a horizontally and vertically in a normal way inside the supermarket without signs of difficulty.
        2. The evidence aforesaid clearly shows that the Plaintiff has grossly exaggerated her symptoms and her evidence of her symptoms could not be accepted as reliable. I therefore agree with Dr. Lam that the appropriate sick leave for the Plaintiff could not be more than 6 months. I further agree that the symptoms being grossly exaggerated, her pain suffering and loss of amenity could not be that as claimed. I wholly accept Dr. Lam’s medical assessment of the Plaintiff and prefer his assessment where it differs from Dr. Lau’s assessment.
        3. As her evidence is not reliable I find that her evidence of the symptoms presently suffered by her to be gross exaggerations. I am of the view that she could not have suffered the extensive complaints that she is alleging and her symptoms are much milder and the duration of the pain is not as stated by her lasting until the present. I am only able to award her a sum of $100,000 for Pain Suffering and Loss of Amenities.
        4. For pre-trial loss of earnings I am award six months loss of earnings at $9.328.20 per month totalling $55,957.20.
        5. Loss of MPF for this period is 5% of this sum at $2,797.86.
        6. As regards Loss of Earning Capacity this is hard to assess in view of the unreliability of her evidence. It is at best nominal and I award a nominal sum of $20,000.00 for this.
        7. For Special Damages, I am of the view that a proportion of the visits to medical clinics and hospitals beyond the initial six months visit was for the purpose of obtaining sick leave certificates and the these visits are not necessary. Hence a proportion of the medical expenses for out-patient treatment is not necessary. I grant the medical expenses incurred up to August 2003 and this amounts to $9,260. This applies to the travelling expenses. In respect of travelling expenses for medical treatment, she is claiming a total sum of $2,500. She is claiming the sum of $10,000 for tonic food. There are no receipts for this. I shall only grant her $2,000 for this head of damage. Special damages awarded amounts to $9,260 + $2,500 + $2,000 = $13,760.00.
        8. Total damages awarded amounts to $100,000.00 + $55,957.20 + $2,797.86 + $20,000.00 + $13,760.00 = $192,515.06.
        9. As the employees’ compensation awarded and paid was $229,786.01, the damages assessed herein could not beat that sum. Hence, I have to dismiss the claim.
        10. Claim be dismissed with an order nisi that costs of the action be paid by the Plaintiff to the Defendant to be taxed if not agreed with Certificate for Counsel. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

C.B. Chan

District Judge

Representation:

Miss Rebecca M.K. Lee instructed by Messrs. Yeong & Co. assigned by D.L.A. for the Plaintiff.

Mr. K.M. Cheung instructed by Messrs. W.H. Chik & Co. for the Defendant.