DCPI 1770/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1770 OF 2007

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BETWEEN

CHUNG PING WAI Plaintiff

and

PEDDER LOGISTICS GODOWN LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in court

Date of hearing: 3-4 February 2009

Date of judgment: 11 June 2009

**JUDGMENT**

1. The Plaintiff, Chung, claims damages for injuries allegedly suffered during work at the warehouse premises of the Defendant, Pedder, at Tsing Yi on 8 September 2004.

**THE ACCIDENT**

1. The warehouse was on the Ground Floor of the Outboard Marine Centre, Tsing Yi. According to Yuen, manager of Pedder, the warehouse premises was returned to the landlord in late 2007.
2. Chung was at the time a warehouse worker. His pleaded case is that he was employed by Pedder. At the time of the accident, a forklift truck was transporting some boxes. As the boxes were being lifted, they started to shift. To prevent them from falling, Chung was instructed to climb up the forklift truck to re-arrange and to stabilise the boxes. In the course of that, the forklift truck, which was still moving, hit against another box nearby, causing it to fall onto Chung. Chung lost balance and fell from about 7 feet to the ground.
3. Chung was the only witness of his accident. According to him, immediately before the accident, he was standing by the door of the container which was in the course of devanning. He was taking a break. A forklift truck driver saw him and requested for his help to adjust the boxes on the truck in order to prevent them from falling. Chung climbed to the top of the forklift truck and prepared to adjust the position of the boxes. Beyond his expectation, the forklift truck moved and thus causing the box nearby to shake and to collapse behind him. He was hit and lost balance and fell to the ground.
4. Pedder’s case is that it had not been made aware of the alleged accident until it received a letter from the Labour Department at the end of August 2007, some 3 years afterwards. Apart from the initial question as to the exact date of the accident, which was clarified by way of amendment of the pleading, Pedder did not seriously challenge Chung’s evidence of how the accident happened. I find the accident happened the way Chung described.

**LIABILITY**

1. Chung contends that Pedder should be liable on the following grounds:
   1. implied duty of care under the employment contract;
   2. statutory duty under sections 6(2)(a) and 6(2)(d)(i) of the Occupational Health and Safety Ordinance, Cap. 509;
   3. common duty of care as occupier of the warehouse under section 3 of the Occupier’s Liability Ordinance, Cap.314; and
   4. negligence of its employee, servant and/or agent, namely the forklift truck driver.

**Implied duty of care under the employment contract**

1. At trial, Chung explained that he had worked at the warehouse for 2 to 3 months prior to the accident. He knew a person called Ah Keung who telephoned him for the job opportunity in the first place. He could not give the full name of Ah Keung. He understood that Ah Keung was employed by Pedder because that was what Ah Keung told him.
2. It later transpired from Chung’s evidence that during the telephone conversation, all that Ah Keung said was that he was then *working at Pedder warehouse* and asked if Chung would be interested in joining him there. Ah Keung suggested the monthly income would be about HK$14,000. Chung said the income depended on the size of the container he had to work on. There was no mention any other terms.
3. There is no evidence that after Ah Keung’s approach, Chung was introduced to or contacted by anyone from Pedder in relation to his employment or confirmation of employment. There was no written contract of employment. Chung was paid in cash twice monthly also by Ah Keung.
4. There is no dispute that the operation of the warehouse was in fact contracted to Wong Hok Lung trading as Ming Fu Logistics Consultant Company. The contract was in writing dated 1 March 2004 whereby Pedder contracted out the operation of the warehouse to Ming Fu. This included unloading and trans-loading containers, storage and warehousing, forklift operation and arrangement of collies (or transportation workers). Ming Fu was also responsible for providing training to employees and taking out employees’ compensation insurance. The contract with Ming Fu was terminated in late 2004.
5. Yuen, the manager of Pedder, explained that after contracting out the operation of the warehouse, Pedder basically kept staff for the office only. Pedder did not assign employee to carry out work like that of Chung or to drive forklift trucks because these were what Ming Fu was contracted to do in operating the warehouse.
6. Pedder stated that neither Chung nor Ah Keung was its employee. The staff record shows that Pedder had 19 members of staff at the material time. There was no record at all of the employment of Chung or Ah Keung at any time. There was also no record of payment by Pedder to Chung at all.
7. The record supplied by the Inland Revenue Department does not show that Chung had ever been employed by Pedder. There was also no record of Chung in Pedder’s employer’s return to the Inland Revenue Department for the year 2004/2005. There was no record of Chung in Pedder’s mandatory provident fund contribution record for September 2004 either.
8. Mr Poon for Chung submitted that both Ming Fu and Pedder could be Chung’s employers because Pedder retained a sufficient degree of control over Chung at work. He was referring to the stipulations in the contract between Pedder and Ming Fu about Ming Fu’s employees. But these were only Pedder’s specifications of its requirement of Ming Fu, including its employees, and Pedder would and could only look to Ming Fu for their compliance. In court, Yuen confirmed that he only took up any issue relating to the operation that needed improvement with Wong.
9. Mr Poon referred to *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951. This authority set out the guidelines for distinguishing a contract of service from that for service. But the fact here was that Chung dealt with Ah Keung. It is not proved that Ah Keung was either an employee or held out by Pedder to employ Chung on its behalf. Therefore to begin with, it is not proved that there existed a contract between Chung and Pedder.
10. I am not satisfied that Chung was employed by Pedder at the material time. In the absence of an employment relationship between Pedder and Chung, no issue of implied duty of care as the employer on the part of Pedder arose for consideration.

**Statutory duty**

1. Mr Poon for Chung referred to section 4 of Cap.509 which provides that the ordinance applies to independent contractors and self-employed persons only in their capacity as employers or as occupiers of the premises where workplaces are located. This is merely the application section of the ordinance.
2. Section 6 under Part II of Cap.509, whether 6(2)(a) or 6(2)(d)(i) as relied on by Chung, clearly stipulates the responsibility for the safety and health of employees at work were on the shoulders of employers. Not being the employer of Chung, Pedder is not caught by these provisions.

**Occupier’s liability**

1. An occupier of premises owes the common duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there: section 3(2) of Cap.314.
2. It is said that Pedder retained sufficient degree of control to be an occupier of the warehouse. Miss Wong for Pedder accepted that. But Miss Wong submitted that the accident, even on Chung’s own case, was caused by the manner in which the forklift driver controlled the forklift truck at the time of the accident.
3. I agree with Miss Wong. There is no suggestion that the accident was the result of any dangerous physical condition of the warehouse. I also do not find that the accident was the result of any dangerous set up of the warehouse including the storage. There is also no evidence of history of accident of such kind (or any kind) in the vicinity of the warehouse. Yuen, the manager, confirmed that.
4. But for the forklift’s driver’s request to Chung to do what he did and the manner in which the driver controlled the forklift truck at the material time, the accident would not have happened. I find that Pedder is not liable for breach of its duty as an occupier of the warehouse.

**Liability for the negligence of the forklift driver**

1. In his evidence, Chung could not tell the name of the forklift truck driver. Chung merely associated the driver with the fact that he worked there and that the forklift truck had the logo of Pedder on it. There is no dispute that Pedder supplied the forklift truck in question and its operation was simply part of the operation of the warehouse contracted out to Ming Fu.
2. Considering the evidence mentioned above, I am not satisfied that the contractual relationship between Pedder and the forklift truck driver, not to mention an employment one, at the material time is proved. The basis for vicarious liability for the negligence of the forklift truck driver as Pedder’s employee is lacking. As such, it also cannot be said that Chung was *instructed* (by his employer) to do what he did.

**Liability for the negligence of Ming Fu or the forklift driver being employee or agent of Ming Fu**

1. It is more likely than not that both Chung and the forklift driver were somehow engaged by (or on behalf of) Ming Fu to work at the warehouse. The question is whether Pedder is liable for any negligence of Ming Fu or its forklift truck driver that resulted in the accident to Chung.
2. Mr Poon for Chung cited *Wan Sze Nok & Anor v Hung Fai Electrical Engineering Ltd and Ors*, HCPI 1117/2004, 17 November 2008. The court there cited from *Clerk & Lindsell on Torts* (19th ed) the principles governing the liability of the employer (of an independent contractor) for the tort committed by the contractor or its servants or agents. The general rule is stated in para. 6-52 of the text:

“If the employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work and in this respect the employees of the contractor, whilst acting as such, stand in the same position as their employer, so that the employer of the contractor is not liable for the torts committed by the contractor’s employees. Of course, even though the damage complained of may have been caused by the wrongful act or omission of an independent contractor or his employee, it may also be attributable to the negligence or other personal fault of the employer. If, for example, he had negligently selected an incompetent contractor, or has employed an insufficient number of men, or has himself so interfered with the manner of carrying out the work that damage results, he will himself have committed a tort for which he can be held liable……”

1. It was argued on behalf of Chung that Pedder failed to show that it had exercised reasonable care in selecting the contractor. Mr Poon questioned Pedder’s decision to engage Ming Fu. He criticised the lack of invitation for tender for the contract. Prior to the contract, Wong had not worked for Pedder before. Wong registered Ming Fu as a business one week after Wong signed the contract with Pedder. Ming Fu ceased business eight months later when the contract with Pedder was terminated. He described Ming Fu as unreliable.
2. According to Yuen, at the material time, Pedder had 3 warehouses including the one in question. The operation method of Pedder is to contract out the operation of the warehouses to experienced contractors such as those already involved in other warehouse operations. Wong, the proprietor of Ming Fu, is a veteran warehouse keeper. Wong used to work in various renowned warehouses including one called Manlitat Warehouse. He has the Forklift Truck Operator Certificate issued by the Occupational Safety and Health Council and the Cargo & Container Handling Industry Card.
3. Yuen described Wong as professional and experienced in the industry. Wong also had good connection and was able to recruit workers and casual workers to work. Yuen added that he had been consulted when his boss was deciding on the choice of contractor. Yuen said that business like Wong’s is a small field (or in his words “行頭窄”) so that whether an operator is good or not must be known. He described Wong as very good in the field.
4. Indeed Wong applied to register Ming Fu a week after the date of the contract with Pedder. But the date of commencement of business of Ming Fu, as per the registration certificate, coincided with the date of the contract. If Wong registered the business for the purpose of this contract with Pedder, this in my view could only be a proper thing to do. This was not indicative of any lack of experience in the field.
5. Yuen has been in his current position in Pedder since 1997. Seeing him give evidence, I do not doubt his assessment of Wong’s reasonable competence *at the time* Pedder was considering the choice of warehouse operator for the warehouse in question.
6. It was also argued that Pedder has failed to take reasonable steps to supervise or to check the work of Pedder. But to begin with, was Pedder under such a duty?
7. *Clerk & Lindsell* (above) continues at para. 6-53:

“**Exceptions to the general rule: non-delegable duties** To the general rule that an employer is not liable for the negligence of an independent contractor there are certain apparent exceptions. It is submitted, however, that these are not true exceptions (at least in so far as the theoretical nature of the employer’s liability is concerned) for they are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to the claimant. The liability is thus not truly a vicarious liability and is to be distinguished from the vicarious liability of an employer for his employee. If the circumstances are such that the law imposes a strict or absolute duty upon the employer, then he cannot discharge his duty by delegating performance of the work in question to an independent contractor. If, therefore, the duty is not fulfilled, the employer is liable even though the immediate cause of the damage is the contractor’s wrongful act or omission. The contractor, by his acts, puts the employer in breach of a personal duty. Such duties are often described as “non-delegable” and may arise either by statute or at common law. For present purposes, they are to be contrasted with the ordinary duty to take reasonable care which can be discharged by the employment of a contractor reasonably supposed by the employer to be competent. At the very least, the non-delegable duty is “a duty not merely to take care, but a duty to provide that care is taken,” so that, if care is not taken, the duty is broken.”

1. The pre-requisite to the duty to take reasonable steps to ensure that the independent contractor, even if competent, did its job properly is a non-delegable duty on the part of the employer (of the contractor). Pedder delegated to Ming Fu the operation of the warehouse and it was Ming Fu’s duty to provide for the safety of the employees or contractors that Ming Fu engaged in the operation. Pedder was not the employer of Chung and did not have any non-delegable duty in such capacity including the statutory duties under Cap.509 pleaded by Chung. It would be unreasonable to expect Pedder to take steps to ensure accident like what happened in the present case would not be caused between 2 persons engaged to work for Ming Fu.
2. In the context of occupier’s liability, Mr Poon further referred to paragraph 12-56 of *Clerk & Lindsell* (above) and the cases of *Yeung Kam Fuk v Len Shing Construction Company Limited*, HCA 6612/1982, *Hsu Li Yun v The Incorporated Owners of Yuen Fat Building*, CACV 16/2000 as well as *Wong Yuk Foon v Nice Property Management Limited*, DCPI 1025/2006. In those cases, the court had to decide whether the defendant occupier had discharged its common duty of care to a lawful visitor of the premises in question by relying on the work of an independent contractor. However what were said in these authorities must be considered in the light of my finding in the present case that this accident in fact had nothing to do with any dangerous physical condition or set up of the warehouse premises.
3. Mr Poon submitted another reason for the existence of non-delegable duty on the part of Pedder, namely, the “extra-hazardous” act of Chung. He is apparently referring to *Clerk & Lindsell* (above) at para. 6-63. However, what that paragraph (and those preceding it) refers to is the existence of non-delegable duty when an independent contractor is *employed to perform an “extra-hazardous act”*. I do not see how the nature of the operation at the warehouse could be described as “extra-hazardous”.
4. Indeed very act of climbing up the forklift truck to stabilise the boxes while the truck was not static was dangerous. However, it was never suggested, not even by Chung, that this was a normal duty of the workers in the daily operation at the warehouse. In fact, according to Chung, he was taking a rest when the forklift driver happened to ask for his help to do what he did.
5. My conclusion is that liability of Pedder is not proved. The claim must therefore fail.

**CONTRIBUTORY NEGLIGENCE**

1. Miss Wong for Pedder did not pursue the argument as to contributory negligence.

**QUANTUM OF DAMAGES**

1. For completeness, I proceed to discuss the quantum of damages, assuming that liability is established. This court was faced with a claim, notwithstanding revision, exceeding this court’s monetary jurisdiction. This was pointed out and resolved upon parties agreeing on all major items of the claim, of course subject to liability.

**Injuries and treatment**

1. Chung sustained injuries over the face, chest, right elbow, left elbow and right forearm. There was a minor abrasion over the right face, contusion to chest with no fracture and contusion to the left knee without structural damage. These were treated conservatively. There was fracture head of left radius with mild displacement. This was treated by screw fixation followed by elbow brace. The right wrist scaphoid fracture was treated by open reduction and screw and K wire fixation as well as open repair of the scapho-lunate ligament. The fracture right radial head was examined under anaesthesia. Chung had also attended courses of physiotherapy and occupational therapy.
2. On 15 July 2008, Chung was examined by Dr Paul Lam and Dr Lam Kwong Chin, the orthopaedic experts engaged on behalf of Chung and Pedder respectively. They produced their joint report dated 12 August 2008.
3. The experts’ examination revealed multiple mature surgical scars with mild tenderness. There is mild muscle wasting of the right upper limb. The range of motion of the right wrist and left elbow is slightly decreased. There is decrease in grip strength of both hands, more on the right side. The left elbow fracture has healed with some heterotopic ossification. The wrist fracture has healed but the distal end of the screen is seen protruding and may cause impingement on the adjacent trapezium. There is no post-traumatic arthritis in both joints.
4. Chung has attained maximal medical recovery. The left radial head fracture has healed in a good position. There is minimal risk of development of post-traumatic arthritis. The experts agree that the sick leave from the accident to late November 2005 was appropriate. The screw should be removed to avoid possible complication. Recovery after the removal surgery should take 2 weeks.
5. The experts differ in their view on the degree of residual problems faced with by Chung. According to Dr Paul Lam, Chung would continue to suffer from right wrist, bilateral elbow and left iliac crest pain. According to Dr K C Lam, the motion range and power should be better that Chung claimed. The doctor noted that Chung was already found to be asymptomatic in October 2006 and the present condition should be even better.
6. The experts agree that Chung should be independent in his daily life and sports activities. But they differ in respect of Chung’s working capacity. According to Dr Paul Lam, Chung would be unable to resume his pre-accident job as a warehouse worker. Alternative occupations requiring less physical demand such as clerical work, messenger or security guard are preferred. Dr K C Lam believes that Chung should be able to resume his pre-accident work. He notes that his work capacity in late 2005 marginally matched his previous demand and it should be much better by now. Chung might experience some reduction in the working efficiency and endurance. Yet the effect should be minimal.
7. Dr Paul Lam assessed that the injuries caused 8% permanent impairment of the whole person and 10% loss of earning capacity. Dr K C Lam assessed such impairment and loss to be 4% and 4% respectively.

**Pain suffering and loss of amenities**

1. This is now agreed at HK$260,000.

**Loss of earnings**

1. The pre-trial loss is now agreed at HK$233,342.
2. The future loss is the only major item in dispute. Chung claims that his pre-accident monthly income was HK$14,000. There is complete lack of documentary proof of this amount. Pedder is also unable to adduce any evidence of how much the warehouse workers got paid for working for Ming Fu at the warehouse at the material time.
3. Despite the difference in the medical expert opinion on whether Chung should be able to resume his pre-accident warehouse work, I tend to accept that realistically he might be faced with some difficulty if he has to handle heavy weight on a recurrent and daily basis as he used to do. Chung managed to obtain another job at the warehouse of another transportation company in March 2005. According to him, this was a relatively lighter job such as sticking labels and checking goods. He started at a salary of HK$7,000 and has been promoted with salary increment since then. In April 2008, his salary was increased to HK$9,300.
4. According to the returns filed by Chung’s current employer for the years 2006/2007 and 2007/2008, the average monthly income of Chung (inclusive of bonus) was HK$11,295 and HK$13,015 respectively. Mr Poon suggested that the difference in income between the pre-accident job and his current job is now HK$2,000 which should be used as the multiplicand for calculating the future loss of income.
5. I do not agree that the alleged difference is substantiated as a matter of fact. The fact was that the contract between Pedder and Ming Fu was terminated in late 2004 and the warehouse premises in question was returned to the landlord in late 2007. There is no evidence that Chung would have acquired the alleged pre-accident income level of HK$14,000 even when he no longer worked for Ming Fu at the warehouse in question. In the circumstances, I am also not convinced that Chung would suffer the alleged loss of HK$2,000 monthly because of the accident and his injuries. Any possible disadvantage that Chung may suffer in the labour market as a result of his injuries should be adequately covered by an award for loss of earning capacity, which is actually agreed between the parties.
6. I would not have allowed the claim for loss of future earnings.

**Loss of earning capacity**

1. This is agreed at 80,000.

**Miscellaneous special damages**

1. An amount of HK$11,000 is claimed for medical expenses, tonic food and travelling expenses. There is admittedly complete lack of documentary evidence in support. Miss Wong proposed an award in the amount of HK$5,000. I agree that this would have been reasonable in the circumstances of this case.

**Future loss and expenses**

1. The experts recommended implant removal surgery. The cost in a private hospital will start from HK$10,000 whereas that at the government hospital will be nominal. I agree with Miss Wong that a surgery at the government hospital would have been reasonable. In the absence of evidence of the actual cost, I would have awarded HK1,000. The experts agreed that recovery from the implant removal surgery should take 2 weeks. I would have awarded HK$7,000 for any loss of income.

**Summary**

1. Damages would have been assessed as follows:

PSLA HK$260,000

Pre-trial loss of earnings HK$233,342

Loss of earning capacity HK$ 80,000

Miscellaneous special damages HK$ 5,000

Future loss and expenses HK$ 8,000

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Total: HK$586,342

1. There would have been up to today interest on general damages at 2% per annum from the date of writ and on special damages at half judgment rate from the date of accident. Interest from today would have run at the judgment rate until full payment.

**ORDER**

1. The action is dismissed with costs of this action to Pedder, including any costs reserved. Costs shall be taxed, if not agreed. For clarity, I certify the engagement of counsel.

Simon Leung

District Judge

Mr Jackson POON instructed by Messrs B Mak & Co for the Plaintiff

Miss Abigail WONG instructed by Messrs Tang & So for the Defendant