## DCPI1839/2006

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1839 OF 2006

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BETWEEN

WONG CHOK WAI Plaintiff

and

SUN CHUNG LUEN CHINESE PRODUCTS

COMPANY LIMITED Defendant

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

Coram: H.H. Judge Chow

Dates of Hearing: 23rd To 25th July and 27th August 2007

Date of delivery Judgment: 8th November 2007

JUDGMENT

1. This is the Plaintiff’s application for damages for personal injuries sustained by him on the ground that the Defendant failed to provide a safe system of work under which the Plaintiff worked, thereby causing injuries to him.
2. The Plaintiff was employed by the Defendant as a dried-food salesman from 12 November 2001 to 31 July 2005. One of his duties was to chop preserved ham (“ham”) with a chopper. He says that because of the chopping work his right shoulder and neck became painful.

Did the Defendant teach the Plaintiff how to chop ham?

1. The first issue I have to decide is: did the Defendant give instructions to the Plaintiff on the method of chopping ham before he started working on 12 November 2001? The Plaintiff’s evidence is that he was not given any instructions by Li Yiu Bong (“Li”), his superior, on the day he commenced working on 12 November 2001. Under cross-examination he said that he knew how to chop ham because when he was working as a temporary worker with the Defendant prior to 12 November 2001, he was shown how to chop ham by a Mr. Tsang. He chopped 8 to 10 pieces of ham without Tsang’s knowledge when he was a temporary worker with the Defendant. The Defence Counsel submits that this is incredible. He says that it was not part of his duty as a temporary worker to chop ham. According to paragraph 5.1 of the Defence,

“The salesmen of the said Department are in charge of selling beverages and Chinese preserved meat such as preserved ducks, sausages and ham. Their duty also includes cutting, weighing and packing the Chinese preserved meat,”

So cutting Chinese preserved meat is within the duty of a part-time salesman. It is his duty to sell dried food, which includes ham. If he chopped ham before selling it, this is credible. Whether Tsang had knowledge of his chopping ham depends on whether Tsang was present when the Plaintiff was doing so. he Defendant never refutes his allegation that he worked as a part-time salesman before 12 November 2001. Since the Plaintiff had the experience of chopping ham when he was working as a part-time salesman, there is no need for the Plaintiff to be trained when he commenced to work as a full-time salesman. The Plaintiff’s evidence in this respect is credible.

1. In paragraph 5 of his witness statement, Li said that he personally taught staff the technique of cutting ham. In his evidence-in-chief, he was asked if anyone had explained to the Plaintiff the method to be adopted when chopping Chinese ham. Li said that every new employee would be so told. When asked whether the Plaintiff had been personally so told, Li answered that there should be. This is a general statement. If he had done so, he ought to have given the answer in an affirmative way. It would not be difficult at all for him to say that. I find that the Plaintiff was not given any training at the time he commenced working for the Defendant.

Method of work

1. The Plaintiff says that from November 2001 to the end of 2003 he chopped the ham by holding the chopper with his right hand, raising the chopper above the level of his shoulder and chopping down with force. This was repeated times until the bone and the meat were severed (“the Plaintiff’s method”). In his witness statement dated 18 January 2007 the Plaintiff described how he chopped the ham leg. Under paragraph 13, he said, “As far as chopping Jinhua ham hard with a cleaver in my right hand was concerned it took a lot of strength to do the job, let alone the fact that chopping it once or twice was not enough to cut it up.”
2. According to the evidence of Li given during trial, the Plaintiff was taught to hold the ham with the left hand, while the chopper would be raised to the level above the shoulder. Then on the first chop the blade of the chopper would be stuck in the ham. After the first chop, both hands would be used. The left hand would lift the ham, and the right hand would raise the chopper, which was still attached to the ham. Both hands would be raised to the chest level, and then the ham would be slammed down onto the chopping board at the same time. This would be repeated several times until the bone and the meat was severed (“the Defendant’s method”).
3. The Plaintiff accepts that it is important that the smaller pieces of ham must be “clean”, otherwise customers would not accept them. The Defence Counsel submits that it is impossible to have a clean cut with the Plaintiff’s method. The chopper would be raised to some 2.5 to 3 feet above the ham. It is simply not possible for the blade to land on the same place every time. The Defendant’s method is the only way to achieve a clean cut. The Plaintiff claims that he could achieve clean cut with his method. That simply is not credible. In my judgment whether a clean cut could be achieved depends on his experience. The Plaintiff used to be a part-time salesman working for the Defendant before 12 November 2001. He had experience of chopping ham before that day. Furthermore, as shown below, the Defendant’s witness Mr. Hung Wai Kwong (“Hung”) was also using the Plaintiff’s method. So the Plaintiff’s version is credible.
4. As far as the Defendant’s method is concerned, it was only mentioned for the first time during trial. It was not pleaded in the defence, and not mentioned in any defence witness statement. If the Defendant’s method was always observed to be the way the Plaintiff adopted throughout the years of his work, it would be strange that this was not mentioned at all.
5. In evidence-in-chief, Hung was asked to demonstrate the method of chopping ham. He naturally lifted his right arm above his head for the first chop. When demonstrating the second chop, he again lifted his right arm above his head while his left arm did not move. When asked to demonstrate again, Hung repeated the same motion several times. In this respect, Hung’s evidence supports the Plaintiff’s evidence. That demonstration is exactly the Plaintiff’s method and it is very different from the Defendant’s method. It is only when queried by this Court, then Hung lifted his right and left arms to the same height at his chest. When he was asked about this in cross-examination, he replied “saying it and doing it are two different things”. He was asked to explain what he meant by saying this. He said that what other people said was different from what he did himself. He could not explain who these “other people” were. It is clear that what he demonstrated (before this Court raised the query) is the method he adopted in chopping ham. What he did after the Court’s query is not natural and is not the way he used to chop ham.
6. Li’s evidence is squarely contradicted by Hung. I accept the Plaintiff’s submission that it was only after the complaints and injuries of the Plaintiff at the end of 2003 that the Defendant’s method was used to alleviate the strenuous requirement of the chopping work, because the Defendant’s method required the left arm to share the load of the right arm. If Li had really taught the Plaintiff the Defendant’s method when the Plaintiff commenced his full-time job with the Defendant, it would have been very strange that the Plaintiff did not adopt the Defendant’s method, because that method would make the left arm share the load of the right arm.
7. The Defence Counsel submits that “Under cross-exam at first the Plaintiff insisted that he had always used own method, but changed his evidence later to say that after his shoulder became painful he changed to the Defendant’s method. Most importantly Plaintiff accepted that the Defendant’s method worked. It is for the Plaintiff to prove that the Plaintiff’s method works and can achieve a clean cut, submit that has not been proved. Invite Court to find that Defendant’s method was used all along, hence very little overhead use, save for first chop. The Plaintiff’s change in his evidence also damages his credibility.” I cannot see how the Plaintiff changed his evidence, unless he had said that during his entire period of employment he used his own method. He did not say that. If the Defendant’s method had been used all along, why is it that Hung would demonstrate the Plaintiff’s method? In his written submission the Defence Counsel does not make any reference to Hung’s method of chopping ham, which is a very important piece of evidence, because his evidence corroborates that of the Plaintiff.
8. The Plaintiff admits that he adopted the Defendant’s method at the end of 2003, after feeling pain and consulting doctors. Under cross-examination, Li was certain that he saw the Plaintiff use the Defendant’s method at the end of 2003. He could not recall, however, the first time in which he saw the Plaintiff use the Defendant’s method because he was not always there to watch the Plaintiff chop. But in re-examination, Li said that he saw the Plaintiff chop ham by using the Defendant’s method during the first week of his full-time employment. I do not believe that he was telling the truth.

The sharing of chopper by co-workers

1. The Plaintiff said that he was the only salesman chopping ham during peak season, except for lunch break, toilet time and days off. Under cross-examination he said that after he had shoulder pain there was rotation with Hung and Wong Yam Cheung. The Defendant’s case is that all along there was rotation during peak season months. But Wong only joined the Defendant in 2003. Hung was asked under cross-examination as to why he did not describe the work arrangements prior to the end of 2003. He replied that he worked everywhere, not only in the Chinese ham department. This is clear evidence from the Defendant that the Plaintiff was the sole person in charge of chopping ham and he did not have any significant help in respect of the chopping work from Hung before he made his complaint in 2003.

Did the Plaintiff complain to the Defendant of his shoulder pain?

1. Li denies that the Plaintiff told him that he suffered from pain due to chopping at the end of 2003. The Plaintiff said that in or about December, he went to government hospitals for medical treatment to the pain occurring on his right hand and right upper body. The doctor warned him that he had to either stop doing his job or use a meat cutting machine instead for cutting ham, otherwise his condition would deteriorate grossly. He then informed the Defendant of this. The Defendant once had the intention of buying a meat-cutting machine, and the section head of the Defendant tried to look here and there, and was quoted $40,000 for it. The Defendant’s management thought that it was too expensive and no further action was taken. The management in charge only told him to buy two new cleavers.
2. The Defendant agrees that the Defendant did consider buying an electric machine. According to Li, they were aware of other shops using electric saw, as it improves efficiency. Since the Plaintiff was manning that counter it is natural to involve him in the process of looking at an electric machine. But the point is, after years of manually chopping the hams, it suddenly considered buying a ham-cutting machine for that reason. This is incredible. The extra choppers were purchased as spares for rotation of use when other choppers were sharpened. Li instructed the Plaintiff to buy 2 more choppers in January 2004. But there were already 4 choppers at that time. It must be that the Defendant only saw the necessity to purchase more choppers when the Plaintiff complained of his pain towards the end of 2003. All these pieces of evidence, when considered together, support the Plaintiff’s case that he did complain to Li about his pain due to the chopping of ham.
3. The Defence Counsel submits that the Plaintiff did not make the complaint because he must have worried about his job if he told the Defendant that there was something wrong with his shoulder. The onset on pain in 2003 was after the outbreak of SARS in Hong Kong when many businesses failed and many became unemployed. He could very easily be replaced if he revealed that he had pain in his shoulder. Therefore, he decided not to tell the Defendant. But there is no evidence to support such assertion.

Failure to properly maintain and whet the choppers

1. Another issue I have to decide is: was the Plaintiff not assisted with sufficient whetting of the blades of the choppers? The Plaintiff’s evidence is that a sharp blade would require 3 to 5 chops to sever the ham, whereas a blunt blade would require 8 to 10 chops, and more force to be applied. I accept this piece of evidence. In cross-examination Li admitted that choppers often became chipped and blunt, and it was difficult to chop ham with such choppers. More force would have to be used, and it would be more tiring. In his witness statement, he stated that workers were instructed to tell him immediately when the choppers became blunt, and he would immediately arrange for the choppers to be whetted. Under cross-examination, he said that at least one sharp chopper would always be available, and it was not possible for all 4 choppers to get blunt at the same time. There was only one occasion on which there was a delay in whetting because the person had returned to the Mainland and could not be reached for 1½ weeks. When he returned, he sharpened the blades within 2-3 days.
2. But according to the whetting records, the Defendant rarely had the choppers for whetting, although it cost very little ($30.00). There is a period of over 10 months (from 22nd January 2002 to 28th November 2002) in which the Defendant did not whet any of the 4 choppers used at the time at all. During the peak season months (from 26th November 2004 to 13th January 2005) none of the 6 choppers then in use were whetted. As such, Li’s evidence that the blades were frequently whetted cannot be true and his general credibility is undermined. The whetting records shows that the Defendant did not properly maintain and whet the choppers. Therefore the Plaintiff was required to use more force and more chopping actions in order to sever the ham.
3. The Plaintiff was required to chop 20 to 30 thighs per day during peak season. Each thigh had to be chopped approximately into 5 pieces. Each piece requiring on average of about 7 chops of the blade. 20 thighs required about 700 chopping motions (20 x 5 x 7) in a day, and 30 thighs required about 1,050 chopping motions (30 x 5 x 7) in a day. Even with the helping out by Hung from 2001 to 2003, during the Plaintiff’s meal breaks or toilet breaks, the Plaintiff still had to do a lot of chopping work.
4. In my judgment, I find that on the evidence the Defendant failed to provide a safe system, method and tools of work, in breach of its duties as an employer to provide a safe system of work.

Contributory negligence

1. The particulars of contributory negligence pleaded by the Defendant are general. There is no specific evidence adduced by the Defendant to show that the Plaintiff is contributorily liable for the injuries he sustained. Hence I find that no contributory negligence has been committed by the Plaintiff.

Medical evidence

1. Dr. Chun Siu Yeung (“Dr Chun”) stated in his report that the Plaintiff’s work involved the elbow, forearm and wrist, with the shoulder flexed at less than 90°. There was seldom any overhead action for chopping. Therefore it was unlikely that the work caused the Plaintiff’s pain and syndrome. Dr. Chun admitted during examination-in-chief that when he examined the Plaintiff, he asked whether the Plaintiff chopped ham by raising both hands above his head, like chopping a log of wood. The Plaintiff said that he did not.
2. The Defendant’s case as revealed for the first time at trial is that the Plaintiff used the Defendant’s method to chop ham. Dr. Chun only came to know about the Defendant’s method on the very day when he was giving evidence in court. The Plaintiff’s Counsel submitted that “As such, there was no chance for Dr. Chun to make any assessment as to whether the Defendant’s Method could cause the shoulder’s impingement syndrome or any other shoulder injury. If indeed the Plaintiff was seen to have used the Defendant’s Method, the Defendant would surely have asked Dr. Chun to comment on this Defendant’s Method and not let Dr. Chun base his opinion on a wrong description of work method.” This submission is clearly correct. Dr. Chun’s assessment of the neck pain and impingement syndrome on the right shoulder not caused by the Plaintiff’s work is clearly based on a wrong understanding of the movement of the Plaintiff’s arm and shoulder during his work.
3. I find that the Plaintiff used the Plaintiff’s method of repeated overhead action of more than 90°, which according to Dr. Lam, could cause impingement syndrome. I am satisfied that the Plaintiff was suffering from impingement syndrome at the time of his employment with the Defendant.

Degree of the Plaintiff’s injuries

1. The Plaintiff is at stage 1 or 2 of impingement syndrome, which arises typically at the age of 25-40, but can occur at any time. At stage 2 of impingement syndrome, the patient usually suffers from recurring pain with activity, which is what the Plaintiff described to Dr. Chun. Dr. Chun agrees with the Plaintiff’s treating doctors that the Plaintiff suffered from impingement syndrome in 2003. His report lists one of the Plaintiff’s complaints as being “pain on the whole right-sided back from shoulder down to the right buttock …… all those symptoms appeared intermittently”. This is consistent with stage 2.

Did sports cause the impingement syndrome?

1. Dr. Chun is of the opinion that the Plaintiff’s work is not a significant factor that could have caused the Plaintiff’s injuries. On the other hand, he opines that the Plaintiff’s previous participation in basketball, badminton and swimming could have contributed to the impingement syndrome. But the Plaintiff was only an amateur player, and he no longer participated in any sports when he came to Hong Kong in 1994. His sports activities were mild, infrequent and for very short periods at a time when he lived in China. Under cross-examination he gave a detail description of what he did in these activities when he was in China. I accept his evidence in this regard. If the Plaintiff felt pain due to impingement at that time he would naturally stop exercising. But there is no evidence of that kind. At the time he was performing chopping work, he felt pain. There is medical evidence showing that the pain in the shoulder coincides with the Plaintiff’s employment with the Defendant. I am satisfied that it is the chopping work that caused the impingement syndrome.
2. The Defence claims that Dr. Lam was disingenuous to discard the results of the handgrip test in his analysis of the impairment and disability. The results of the handgrip is strongly suggestive of exaggeration on the part of the Plaintiff. Therefore it must be taken into account in considering the other complaints. It is his medical expert who discarded the results, and not the Plaintiff. This is beyond his control. Hence I cannot see how the results of the handgrip could show exaggeration on the part of the Plaintiff.

Does the presence of a hook in the Plaintiff’s shoulder affect causation?

1. Dr. Chun is of the opinion that there is a “hook” in the Plaintiff’s shoulder causing him to be more susceptible to impingement syndrome. Dr. Lam disagrees. This is irrelevant. I find that the Defendant did breach its duty, causing the Plaintiff to be exposed to risks; hence it is liable for any injuries the Plaintiff suffers due to any peculiar susceptibilities.

Is the neck pain triggered by work?

1. Dr. Chun opines that since the Plaintiff never complained of neck pain to doctors between 2003 and 2004, the injury should not have been caused by work. Dr. Lam explained in examination-in-chief that the Plaintiff may have complained to doctors about pain at the base of his neck and at the shoulder to doctors around 2003 to 2004. However, the doctors may have regarded it as shoulder pain.
2. Dr. Chun accepted during cross-examination that chopping work is one of the factors which could have caused the neck pain. He agreed that the strenuous work could trigger the neck pain. The Plaintiff had never suffered from any neck pain before he started working for the Defendant. There is medical evidence showing that the Plaintiff suffers from impingement syndrome at the right shoulder and triggered the neck pain due to his chopping work for the Defendant. I find that the chopping work contributed to the neck pain.

Quantum

Pain, suffering and loss of amenities

1. In *Chow Wai Ming v. Chan Yuk Charm* (HCPI 1111/96), the plaintiff was riding his motorcycle when he collided into a motor-car driven by the Defendant. The plaintiff suffered a comminuted fracture of the proximal humerus of the right shoulder, which united in three months. The plaintiff was left with a deformity of the humeral head causing bony impingement on a tendon in the shoulder. Doctors assessed 8% impairment of the whole person. His daily life was largely unaffected; his recreational activities slightly limited, but he still suffered from residual pain. Deputy Judge Woolley assessed PSLA at $300,000.00. The Plaintiff’s injuries in this case are somewhat more serious than the injuries suffered by the Plaintiff in the present case. In my judgment, the appropriate award under this head should be in the sum of $250,000.00.
2. The Defence cited the case of *Siu Leung Sheng Peter v. Chung Wai Ming* (HCPI 43/2006) in support of its case that PSLA should be in the sum of $30,000. In that case, the plaintiff suffered mild neck stiffness. In the present case, the Plaintiff suffered significant injuries to his right shoulder and neck. So the case of Siu Leung Sheng Peter is materially different from the present case.

Pre-trial loss of earnings

1. The sum of $8,483.00 in relation to the Plaintiff’s average monthly income during employment with the Defendant has been agreed by the parties. Due to the Plaintiff’s disability, he was dismissed by the Defendant on 31 July 2005. The Defendant produced no other reason for the dismissal. Then the Plaintiff was unemployed for the period from 1 August 2005 to 31 October 2005. During the 2-month period from 1 November 2005 to 31 December 2005, he was employed as a watchman by Calibre Services Development Limited, earning a total sum of $7,667.00. He was dismissed because his performance was affected by his injuries and disabilities. During the 3-month period from 1 March 2006 to 31 May 2006, he resumed work as a watchman and was employed by Goodtech Management Limited earning a total of $17,787.60. He was laid off because Goodtech Management Limited was unsuccessful in tendering a contract for security guard services. He remained unemployed from 1 June 2006 to 22 June 2006. From 23 June 2006 to 31 March 2007, he was employed by Onward Security Co. Ltd., and resumed working as a watchman, earning a total sum of $51,022.90. He resigned because he was unable to cope with the job demands.
2. It is expected that the Plaintiff may take up a job as a watchman during the period from 1 April 2007 to 22 July 2007 (3.7 months) with a monthly salary of $5,000.00. The parties agreed that the Plaintiff’s average monthly income during employment with the Defendant was $8,483. Hence the Plaintiff’s pre-trial loss of earnings from 1 August 2005 to the trial date on 23 July 2007 (23.7 months) is as follows-

($8,483.00 x 23.7 months) - $7,667.00 - $17,787.60 - $51,022.90 – ($5,000.00 x 3.7 months) = $106,069.60

Pre-trial loss of MPF

1. Pre-trial loss of MPF from the date of the Accident to the date of trial is as follows:-

$106,069.60 x 5% = $5,303.48

Post-trial loss of earnings

Multipliers for post-trial loss of earnings

1. The Plaintiff was 51 years old at the time of the Accident and was 55 years old at the trial date. If not for the accident, the Plaintiff would have continued to work as a Chinese-dried food salesman before retirement at 65. The Plaintiff’s Counsel referred to the following authorities, and submitted that a multiplier 8 would be appropriate for assessment under this head.
2. In *Yeung Hing Lun v. Hao Tong Trading Ltd.* HCPI 132/2003, the plaintiff was a transportation worker, aged 51 at the time of the accident and 53 at the trial date, a multiplier of 8 was adopted.
3. In *Lau Hi v. Kam Shek Investment Co. Ltd.* 1986 No. A 5978, the plaintiff was a construction site worker, aged 53 at the time of the accident and 57 at the trial date, a multiplier of 8 was adopted.
4. Assuming that the Plaintiff may take up another job as a watchman with a monthly salary of $5,000.00, the post-trial loss of earnings is calculated at:-

($8,483.00 - $5,000.00) x 12 months x 8 = $334,368.00

Post-trial loss of MPF

1. As such, post-trial loss of MPF is as follows:-

$334,368.00 x 5% = $16,718.40

Damages for loss of earning Capacity

1. In *Li Wan Choi v. Choi Wan Hing & Anor* [2000] 4 HKC 549, the plaintiff worked for the defendant as a furniture delivery worker. He sustained a fracture at the base of his right metatarsal bone in a traffic accident. He suffered some residual disability, and he could not lift heavy objects. The court found that the Plaintiff would have to accept some discount on salary because of his disabilities. As such, the assessment of loss of earning capacity was made on the basis that the plaintiff could be expected to be at a disadvantage in the job market which might cause him to be out of work for a period of one year. The Plaintiff claims a sum of $30,000.00 under this head, equivalent to about 6 months of his $5,000.00 potential monthly salary. I would allow this sum.

Travelling Expenses

1. The sum of $130.00 for traveling expenses is agreed.

Medical Expenses

1. The sum of $430.00 for medical expenses is agreed.

Future medical expenses

1. The Plaintiff still experiences intermittent right shoulder and neck pain. The Plaintiff would require to receive further orthopaedic and/or physiotherapy treatment from the hospital. I would allow that the claim for future medical expenses in the amount of $15,000.00 is appropriate. I allow this sum to be awarded to him.

Damages for tonic food

1. The sum of $2,164.60 under this head is agreed.

Award

1. The total award is summarized as follows:-

(1) PSLA $250,000.00

(2) Pre-trial loss of earnings $106,069.60

(3) Pre-trial loss of MPF $5,303.48

(4) Loss of future earning $334,368.00

(5) Post-trial loss of MPF $16,718.40

(6) Damages for loss of earning capacity $30,000.00

(7) Travelling expenses $130.00

(8) Medical expenses $430.00

(9) Future medical expenses $15,000.00

(10) Tonic food expenses $2,164.60

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$760,184.08

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I order that the Defendant do pay, within 14 days from today, the sum of $760,184.08, with interests there on. General damages for pain and suffering will carry interest of 2% p.a. from the date of writ to the date of judgment. Special pre-trial damages will carry interest of half the judgment rate from the date of accident to the date of judgment. Commencing from 9th November, 2007 the judgment debts shall carry simple interest at judgment rate until payment.

Costs

1. I make an order nisi that the Plaintiff is to have costs of these proceedings, to be taxed if not agreed, with certificate for Counsel, and that the Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations. This order nisi will be made absolute in 14 days’ time.

( S. Chow )

District Judge

The Plaintiff: represented by Mr. Erik Shum, instructed by Messrs. Yip, Tse & Tang, Solicitors.

The Defendant: represented by Mr. Patrick Lim, instructed by Messrs. Susan Liang & Co., Solicitors.