## DCPI 1876/2009

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1876 OF 2009

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BETWEEN

Cheung Kwong Hon Plaintiff

and

Nixon Cleaning Company Limited 1st Defendant

Paul Y. Construction & Engineering Co. Limited 2nd Defendant

CLP Power Hong Kong Limited 3rd Defendant

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Coram: H.H. Judge Chow

Dates of Hearing: 14th to 16th December, 2010

Last date of handing in submissions: 20th January, 2011

Date of handing down Judgment: 22nd February, 2011

JUDGMENT

1. This is the Plaintiff’s claim for damages in respect of the personal injuries sustained by him at an accident which occurred on 11.3.2007 when he was the employee of the 1st Defendant as a cleaning worker. At all the material times, the 1st Defendant was carrying on cleaning business at the junction of Ivy Street and Tai Kwok Tsui Road, Tai Kwok Tsui, Kowloon. The 3rd Defendant was carrying on the business of construction/road/underground cable works, and engaged the 2nd Defendant for the said work at the junction.

The Plaintiff’s evidence

1. At about 9.00 a.m. on 11.3.2007, the Plaintiff was working near a concrete pillar underneath the highway overpass at the junction of Tai Kok Tsui Road and Ivy Street (“the Site”), cleaning and collecting rubbish in that area. By this time he had worked for the 1st Defendant for about 6 months. After working for the first week, he was asked by Ah Tung, the 1st Defendant’s foreman, to clean up the Site, even though there were construction works ongoing there. He was asked to do the same work every week. Within the Site, there was an area where about 6 plastic covers had been placed on top of a hole. When he was doing cleaning work on top of one of these plastic covers, the covers suddenly shifted positions and collapsed immediately. As a result he lost balance and fell into the hole together with the plastic covers, sustaining personal injuries.
2. The hole covered by the plastic covers was about 1.8 deep, and 1.8m to 2m in diameter, and the water inside it was about 1.3m deep. His clothes were soaked up to the chest. His portable phone could not function because of the damage done by the water. He got out of the hole by holding onto the railing. He asked his colleague (Madam Ng Tsui Hing) to notify his supervisor Mr. Suen Kin Wah to make a report of the accident. After 15 minutes, Suen Kin Wah turned up at the Site. Eventually Suen Kin Wah drove him to the Kwong Wah Hospital.
3. In the Accident Report dated 11.3.2007, Suen Kin Wah stated that Ng Tsui Hing said that the Plaintiff was performing his cleaning activity and fell into the trench at the Site and his leg was injured. He saw the Plaintiff standing next to the railing, his clothes below the abdomen were all wet with injuries on his legs. He asked the Plaintiff how the incident had happened. The Plaintiff said that he was cleaning rubbish and carelessly fell into the trench at the Site, injuring his legs and his clothes were wet. In Form 2 (dated 17.3.2007, and filed by the 1st Defendant), it was stated that the Plaintiff was injured at the China Light Site, during cleaning activity. The Accident Report and Form 2 clearly stated that the Plaintiff was injured while he was performing cleaning activity.

The evidence of the 1st Defendant

1. Wong Chui Lan (supervisor of the 1st Defendant) testified for the 1st Defendant. In her witness statement, it was stated that Ng Tsui Hing found the Plaintiff inside the trench at the Site. She agreed that the 1st Defendant had a foreman called Ah Tung, and that the 1st Defendant’s foreman instructed the Plaintiff to work. She was aware of the Accident Report which mentioned that Ng Tsui Hing told the foreman Suen Kin Wah that the Plaintiff was injured while cleaning rubbish.

The evidence of the 2nd and 3rd Defendants

1. Mr. Yu Man Kwong testified for the 2nd and 3rd Defendants. He said that the plastic covers could be firmly secured and interlocked with each another. There was a metal bar to support them in the middle. It was not possible for them to have collapsed. He had checked the plastic covers at the Site. He had not been notified about any disruption of the plastic covers at the Site. He agreed that:-

if the edge of a plastic cover barely touches the ground, it would have minimal or no support from the ground;

if the edge of a plastic cover barely touches the metal bar in the middle, it would have minimal or no support from the metal frame;

(c) if a plastic cover is not interlocked with another plastic cover, it would have no support from another plastic cover.

Analysis of the evidence

1. Upon arriving at the Site, Suen Kin Wah saw him standing next to the railing with wet clothes and injured legs. Ng Tsui Hing saw him standing in the trench. There is no doubt that the Plaintiff did fall into the hole at the Site. As reflected by the Accident Report and Form 2, he was injured when doing cleaning activities. He did so pursuant to the instruction of the foreman of the 1st Defendant.
2. The 1st Defendant denies that its foreman instructed the Plaintiff to work at the Site. But it did not call its foreman Ah Tung to testify in Court. Wong Chui Lan was not present when working instruction was given to the Plaintiff. The 1st Defendant failed to call its own employees, namely Ng Tsui Hing and Suen Kin Wah, to testify in Court. There is simply no evidence to refute the Plaintiff’s evidence that Ah Tung asked him to do cleaning work at the Site. On the other hand, the contents of Form 2, signed by the 1st Defendant, clearly states that the Plaintiff was injured during cleaning activities. In the Accident Report Ng Tsui Hing said that the Plaintiff was performing his cleaning activity and fell into the trench at the Site.
3. The Accident Report was complied on 11.3.2007. It was signed by Suen Kin Wah. There was no reason or inducement for him to make any false report at that time. In the Accident Report, he said that the Plaintiff said to him, on his arrival at the Site, that due to carelessness, he had fallen into the trench. This statement is against the Plaintiff’s own interest. The Plaintiff could not be lying at that time, and so he was telling the truth. There was no valuable property inside the Site to attract thieves. It was not suggested that he entered to site to obtain some valuable things. So he must have entered the Site to perform his cleaning duties. I find that he was doing cleaning work at the Site at the material time.
4. In paragraph 7 of her witness statement (dated 30.3.2010, made for the purpose of this litigation), Wong Tsui Lan said, “Madam Ng Tsui Hing said that she was pushing the cart across the road, but they were not performing cleaning work.” When it was suggested to her in cross-examination that such evidence was used because her company wanted to avoid liability, she said, “You can put it this way”. I attach no weight to such a piece of evidence. She also said that when she visited the Plaintiff in the hospital the Plaintiff could not give a definite answer as to why the Plaintiff had entered into the Site. She did not pursue the matter any further. This piece of evidence does not add anything to the 1st Defendant’s case. The fact remains that he did enter into the Site.
5. The 1st Defendant owes a duty of care to the Plaintiff to provide him with a safe place to work. An employer must take reasonable steps to see that the place at which an employee works is safe. It assigned the Plaintiff to clean the Site, knowing that there were construction works being carried out there. It had not taken any steps to ensure that the Site was a place safe for working. Therefore they committed a breach of its duty by placing the Plaintiff in a dangerous situation.
6. The 2nd and the 3rd Defendants were the sub-contractor and principal contractor of the Site respectively. They had control of the Site as occupiers. But the Plaintiff was not invited by the 2nd or 3rd Defendant to work at the Site, though he was instructed by the foreman of the 1st Defendant to do so. In that sense he was a trespasser to the Site. The duties owed to trespassers by an occupier are set out in the case of *Chan Yan Nam v Hui Ka Ming t/a Kar Lee Engineering* HCPI 1169/2000:-

‘In *British Railways Board v. Herrington* [1972] AC 877, [1972] 1 All ER 749 the House of Lords reconsidered the decision in *Addie v. Dumbreck*. The effect of the decision was that it became possible for a plaintiff, even though he was a trespasser, to recover in negligence. The precise nature of the duty owed to a trespasser gave rise to controversy and in 1984 statutory provision was made for the liability of an occupier to a trespasser in the United Kingdom. There was no corresponding Hong Kong statute. The law applicable in Hong Kong is that set out in *BRB v. Herrington*. For the purposes of this judgment it is sufficient to refer to some of the passages in the opinions of the Law Lords in that case.

Per Lord Reid at 899:

“So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial probability that trespassers would come I think that most people would regard as culpable failure to give a thought to their safety.”

Per Lord Morris of Borth-y-Gest at 909:-

“…… An occupier owes no duty to make his land fit for trespassers to trespass in. …… [but there is] a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to take such steps as common sense or common humanity would dictate.”

… … … … … … … … … … … … … …… …… …

Earlier Lord Pearson said at 922:

“…… [the occupier of premises] …… does not owe to the trespasser a duty to take such care as in all the circumstances of the case is reasonable to see that the trespasser will be reasonably safe in using the premises for the purposes for which he is trespassing …… It does not follow that the occupier never owes any duty to the trespasser. If the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor. Very broadly stated, it is a duty to treat the trespasser with ordinary humanity.”

Per Lord Diplock at 941:

“The duty [to the trespasser] does not arise until the occupier has actual knowledge either of the presence of the trespasser upon his land or facts which make it likely that the trespasser will come on to his land; and has also actual knowledge of facts as to the condition of his land or of activities carried out upon it which are likely to case personal injury to a trespasser who is unaware of the danger. …… Once the occupier has actual knowledge of such facts, his own failure to appreciate the likelihood of the trespasser’s presence or the risk to him involved, does not absolve the occupier from his duty to the trespasser if a reasonable man possessed of the actual knowledge of the occupier would recognize that likelihood and that risk.”’

1. The Site is located near the major road of Tai Kok Tsui Road, surrounded by primary school and hotels. It is a busy area with many passers-by. The 2nd and 3rd Defendants should have been fully aware that there is a high chance of lawful visitors/trespassers entering the Site. The fence was 1 metre high. The Plaintiff could easily climb over it and enter the Site. So it was not properly fenced off. No worker was there on Sundays, to stop people from entering it. P. 127 of the trial bundle shows the sign outside the Site. It does not show any warning about the danger in the Site. It does not say passers-by could not enter the Site. Mr. Yu Man Kwong said that there were warning signs in the Site, but he could not find them in the photographs. The 2nd and 3rd Defendants placed plastic covers to cover the hole. This indicates that they were aware of the hidden danger of the hole in the Site. It is their duty to ensure that these covers would not move easily so as to ensure safety within the Site. But the plastic covers collapsed when the Plaintiff set his foot on them. This must have been due to one or more of the following factors:- (1) the plastic covers were not properly secured; (2) their edges barely touched the ground; (3) their edges barely touched the metal bar, or (4) not interlocked properly with each other.

Occupational Safety and Health Ordinance (“OSHO”)

1. The Site falls within the meaning of a “workplace” under section 3 of OSHO. Section 6 of SOHO provides:-

“(1) Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer’s employees.”

The 1st Defendant is liable under section 6 of OSHO.

1. Section 7(1) of SOHO reads:-

“(1) If an employee’s workplace is located on premises that are not under the control of the employee’s employer, the occupier of the premises must ensure that:-

the premises; and

the means of access to and egress from the premises; and

any plant or substances kept at the premises,

are, so far as reasonably practicable, safe and without risks to health.”

Section 7(1) does not apply to the 2nd and 3rd Defendants because they were not aware that the Site was being used as a workplace by the 1st Defendant at the material time.

Contributory Negligence

1. There is no evidence to show that the Plaintiff was at fault in the course of his sustaining injuries. Although in the Accident Report he said that due to carelessness he fell into the trench, there is no factual evidence to show that he was acting carelessly, before he fell into the trench.

Injuries and Treatments

1. The Plaintiff was admitted to the Kwong Wah Hospital on the day of the accident. X-ray revealed a fracture of his right distal tibia. Open reduction and internal fixation of the right distal tibia was performed on 15.3.2007. Sick leave was granted from 11.3.2007 to 25.10.2007, and from 3.11.2007 to 23.1.2008.
2. On 29.9.2009 Dr. Wong See Hoi and Dr. Daniel K.H. Yip jointly examined him. Dr. Wong opines that he had reached maximum medical improvement. Recovery is satisfactory, but it is expected that he will have on and off attacks of pain, especially after prolonged walking, stair climbing and heavy lifting, etc. He suffers 4-5% impairment for the whole person for residual pain after fracture of right distal tibia. But Dr. Yip opines that he only suffers 1% in this regard. Dr. Wong opines that he suffers 4-5% loss of earning capacity. Dr. Yip opines that he has not suffered any loss of earning capacity. Both doctors opine that he was able to return to his full duty.
3. Dr. Wong agrees to the intermittent sick leave granted by treating doctors from 11.3.2007 to 23.1.2008. Dr. Yip opines that sick leave granted by the orthopaedic specialist up to 6.8.2007 is reasonable. In my judgment, the treating doctors who granted the sick leaves were in the best position to decide whether sick leave should be granted at the material time. This is because they had personal knowledge of his situations when they examined him. Other doctors do not have such advantage of assessment. The Defence Counsel commented on the Plaintiff’s asking the treating doctors for sick leaves to be granted. The mere asking for sick leave is not improper. It is up to the treating doctors to decide independently whether the Plaintiff’s condition at the material time was justified for them grant the sick leave. There is no evidence showing improper conduct on the part of the Plaintiff. Therefore the intermittent sick leave from 11.3.2007 to 23.1.2008 is justified.

Pain, suffering and loss of amenities (“PSLA”)

1. In *Chan Kiu v. Lee Fai (t/a Fai Kee Timber* (1997) 2 HKLRD 444 the Plaintiff had a compound fracture of the left tibia and right fifth metatarsal bone base. He had 2 operations at the left knee region, and was hospitalized for about 1½ months. The Court made an award of $350,000 for PSLA. In the instant case, the Plaintiff did not suffer from a compound fracture of the tibia. His injuries were less serious than the Plaintiff in the case of *Chan Kiu*. A reasonable award for PSLA would be in the sum of $200,000.

Pre-trial loss of earnings

1. The Plaintiff claims $67,758 for pre-trial loss of earnings based on a monthly salary of $5,414.50. His sick leave lasted from 11.3.2007 to 23.1.2008 for a total of 10 months and 13 days. The award under this head during the sick leave period is $56,415.596 ($5414.5 x 10 + $5,414.5 x 13/31). MPF on this amount is $2820.7798 ($56415.596 x 5%). The total amount is $59,236.38 ($56415.596 + $2820.7798).

Post-trial loss of earnings

1. The Plaintiff could, and did resume his pre-injury occupation. He was paid more by the new company (about $5,700 per month). No award under this head should be given.

Loss of earning capacity

1. According to Dr. Wong and Dr. Yip, the assessments on the whole person impairment are 4-5% and 1%. These assessments do not involve substantial figures. There is no substantial risk that he will suffer a serious handicap in the labour market in the future. So no award under this head should not be made.

Special damages

1. The total claim is $6,955 ($4,255 for medial expenses, $1,000 for traveling allowances, $1,000 for nourishing food and $700 for a broken mobile phone). The amount claimed is reasonable.

Post-trial damages

1. $5,000 is claimed for future expense of an operation to remove the nail in his right foot. There is no medical evidence to support this claim. So no award should be granted under this head.

Summary of quantum

1. The total awards made are as follows:-

PSLA $200,000.00

Pre-trial loss of earnings + MPF $59,236.38

Post-trial loss of earnings + MPF 0.00

Loss of earning capacity 0.00

Special damages $6,955.00

Less: EC award ($47,381.71)

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$218,809.67

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1. If each Defendant had acted properly, the Plaintiff would not have sustained the injuries. So the Defendants should be jointly and severally liable for his injuries. Accordingly I order that the 1st, 2nd and 3rd Defendants do pay, jointly and severally, within 14 days from today, to the Plaintiff, the sum of $218,809.67 with interests thereon; interest on the sum of $200,000 at 2% p.a. from 14.9.2009 to 21.2.2011; interest on the sum of $18,809.67 ($59,236.38 + $6,955 - $47,381.71) at 50% judgment rate from 11.3.2007 until 21.2.2011. From 22.2.2011to satisfaction, the interest on $218,809.67 is at judgment rate.

Costs

1. I, make an order nisi, to be made absolute in 14 days’ time, that the 1st, 2nd and 3rd Defendants do pay, jointly and severally, costs of this action to the Plaintiff, to be taxed, if not agreed, with certificate for Counsel.

( S. Chow )

District Judge

The Plaintiff: represented by Mr. Jackson Poon, instructed by Messrs. Huen & Partners, Solicitors.

The 1st Defendant: represented by Mr. Victor Gidwani, instructed by Messrs. Woo, Kwan, Lee & Lo, Solicitors.

The 2nd and 3rd Defendants: represented by Mr. Ashok K. Sakhrani, instructed by Messrs. Winnie Leung & Co., Solicitors.