## DCPI 2223/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2223 OF 2007

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| --- | --- | --- |
| BETWEEN | LEUNG KIN FAI | Plaintiff |
|  | and |  |
|  | IDS LOGISTICS (HONG KONG) LIMITED | Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 28 - 30 April, 2009

Date of handing down Judgment : 11 May, 2009

# JUDGMENT

**Background**

1. Mr. Leung was employed by the Defendant, IDS Logistics (Hong Kong) Ltd. ("**IDS**"), as a delivery man. IDS is a member of the Li & Fung Group, and an agent and distributor of a wide range of products, which includes canned goods, beverages, food products, wine and shoes which are delivered to supermarkets, restaurants, retail outlets and residences on a daily basis. IDS has a fleet of large and small trucks used for delivery. Mr. Leung's job is to load goods onto a delivery truck, and to deliver the goods to IDS' clients at different locations, in accordance with IDS' delivery orders. He works in a team of 3 workers, which comprises the truck driver and a team leader who supervises the truck delivery and also assists in the delivery.

1. In the evening of 17 December 2004, at about 8 p.m., Mr. Leung and his team were still on their delivery round. In the process of delivering some beverages to a shop in Ngau Tau Kok in Kowloon, Mr. Leung slipped as he was alighting from the truck, and fell, sustaining injuries to his back and his foot as a result. These proceedings are instituted by Mr. Leung against IDS, seeking damages in the total net sum of $895,693.89.
2. Mr. Leung claims that the accident was caused by the negligence, breach of statutory duties, or breach of the contract of employment on the part of the IDS. IDS denies that the accident was caused by any negligence or breach on its part, claiming that it had taken all reasonable steps to ensure the safety of Mr. Leung.

**Issues**

1. The issues for determination at trial are:
   1. Did Mr. Leung sustain injury in the manner he described?
   2. Was Mr. Leung's injury caused by IDS' negligence or breach of duty?
   3. What are the damages recoverable by Mr. Leung?

**Did Mr. Leung sustain injury in the manner he described?**

1. Counsel for IDS has referred to Mr. Leung's inconsistent accounts of the accident. In the report filed by Mr. Leung for his employer on the day following the accident ("**Report**"), Mr. Leung stated that he lost balance and fell, when his right foot stepped on an unstable ditch cover on the side of the road and his left foot stepped into a gap in the ditch cover. In the Application filed in DCEC 1733/2006, which were proceedings instituted by Mr. Leung for employees compensation, it was stated that he was "trapped by the ditch" as he was getting off the truck. In the Statement of Claim filed in these proceedings, it was stated that while Mr. Leung was getting off the truck, "he slipped and fell from the oily step of the lorry and his right foot was trapped by the ditch".
2. According to Mr. Leung's Statement filed in these proceedings, his right foot slipped on the foot-rest or stepping board on the left side of the truck, which caused him to lose his balance and to fall forward, and as his left foot stepped on the ground to support his body, his left foot stepped on the broken ditch cover on the side of the road, and he lost his balance and fell to the ground on his left.
3. When Mr. Leung gave evidence at trial, he stated that he slipped when he had just put his right foot on the edge of the plastic platform on the floor ***inside*** the truck, which caused his right foot to immediately step onto the ditch cover on the side of the road, and just as his left foot also stepped onto the broken ditch cover, he lost his balance and fell to the ground.
4. It is Mr. Leung's case that at the material time, he did not know what had caused him to slip when he alighted from the truck. According to Mr. Leung's evidence, it was only some time after the accident that he learnt from Mr. Fan, his team leader, that there was a patch of oil or greasy substance on the foot rest, and that he had slipped as a result of the oil or greasy substance.
5. According to the evidence of Mr. Fan, he was sitting beside the driver in the front of the truck, with Mr. Leung on his left. When the truck stopped at the MTR station in Ngau Tau Kok, the driver alighted on the right and Mr. Leung alighted on the left side of the truck. Mr. Fan remained in the truck to go through the delivery orders. Suddenly, he heard the driver asking him to get off the truck to help Mr. Leung. According to Mr. Fan, as he was alighting from the left of the truck, he noticed that there was a patch on the foot-rest on the left, which he had to avoid as he was getting off the truck. Mr. Fan's evidence is that he found Mr. Leung fallen on the side of the road, and he and the driver had to assist Mr. Leung to get into the truck to rest. Mr. Fan then asked the driver to clean the stain on the footrest on the left of the truck. Thereafter, Mr. Fan took care of the delivery, so that Mr. Leung could rest inside the truck. Mr. Fan could not say for certain what stain it was on the footrest, or whether it was an oil stain, but he was clear in his evidence that he did see such a stain. According to Mr. Fan's evidence, he saw the driver use a piece of cloth to remove the stain before Mr. Fan left with the deliveries. The issue was not raised or discussed again, until Mr. Fan met with Mr. Leung some time after the accident, when Mr. Leung mentioned his misfortune of having sustained injuries as a result of falling from the truck, and Mr. Fan pointed out that he had seen a stain, and that Mr. Leung had slipped because of the stain.
6. Mr. Chin, who was IDS' Senior Transport Supervisor, gave evidence for IDS. According to Mr. Chin, Mr. Leung had told him on the day following the accident that he had fallen because he had stepped onto an unstable ditch cover on the side of the road. Mr. Chin's evidence is that neither Mr. Leung nor anyone on Mr. Leung's team had ever mentioned to Mr. Chin that Mr. Leung had slipped because there was an oily patch or stain in the truck. Mr. Chin originally claimed that delivery men such as Mr. Leung would not step on the footrest of the truck in the course of their deliveries. When queried by the court, Mr. Chin withdrew such a statement. It is inconceivable how Mr. Leung could avoid using the footrest of the truck when getting on or off the truck in the process of making deliveries.
7. Even on Mr. Chin's evidence, he accepts that at approximately 8 p.m. on the day of the accident, Mr. Leung had telephoned him to say that he had injured his foot as he was alighting from the truck and as he was stepping on to uneven ground. It was in answer to Mr. Chin's claim in his Statement, that Mr. Leung had never mentioned to Mr. Chin when he was filling out the Report that he had slipped, or that an oil stain had caused Mr. Leung to slip, that Mr. Leung explained that prior to finalizing the Report, he had originally stated in a draft of the Report that he had slipped from the truck, but that Mr. Chin had asked him to amend that statement in the Report. I do not consider it material whether Mr. Leung had been pressurized into amending his draft of the Report. After hearing the evidence of both Mr. Leung and Mr. Chin, I consider it more probable than not that Mr. Chin had indeed asked questions of Mr. Leung in relation to Mr. Leung's draft of the Report, and had asked Mr. Leung to amend the draft for the purpose, as Mr. Chin claims, of making the Report clear as to the circumstances of the accident. These questions may not have had the more sinister implications Mr. Leung had read into them, but it suffices to say that I do not regard any failure on Mr. Leung's part to expressly state in the Report that he had slipped as he was getting off the truck as rendering his evidence incredible in relation to the accident and the cause of his injury.
8. Notwithstanding the inconsistencies in the details of the fall as given by Mr. Leung, I am satisfied on the whole of the evidence that the gist of Mr. Leung's accounts is that as he was alighting from the truck, he had somehow slipped, lost his balance as he landed on the ditch cover, and fell on the side of the road. A victim cannot be expected to recall and recount the small details of where he had placed his right and left foot, nor the sequence of his body movements in the flash of the moment. I consider that Mr. Leung has given a consistent account throughout, in his account to the medical staff at the hospital where he was treated in the same night of the accident, in his Report to IDS, and in the legal proceedings, that he had slipped as he was getting off the truck.
9. I am also satisfied from Mr. Fan's evidence that he had seen a patch or stain on the footrest, and that he was sufficiently concerned to avoid the patch or stain as he alighted, and to instruct the driver to remove the patch or stain to avoid anyone else falling as a result. It is understandable that Mr. Fan had not immediately mentioned to Mr. Leung or the driver that the stain he had seen had caused Mr. Leung to slip and fall. According to Mr. Fan, their focus immediately after the accident was to help Mr. Leung up, to get him to rest in the truck, and then to get on with the deliveries. In any event, I see no reason for Mr. Fan to lie. He has no benefit to obtain from Mr. Leung from these proceedings, and he is still working for IDS. He appears to be a forthright and honest witness in relation to what he had seen and done in the evening of the accident. Whether or not Mr. Leung had slipped as a result of his stepping on the stain or patch which Mr. Fan had seen is another matter. Mr. Fan frankly admitted that it was only his guess that the stain had caused Mr. Leung to slip on the day in question.

**Was Mr. Leung's injury caused by the IDS' negligence or breach of duty?**

1. Mr. Leung's causes of action involve the same standard, i.e. to take reasonable care. Applying the principles outlined in *Ward v. Tesco Stores Ltd.* [1976] 1 WLR 810, 815 and applied by Sakhrani J in the case of *So Wang Chun v. Rainforest Ltd. & Others* HCPI 64 of 2006:

"It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault."

1. I and satisfied that Mr. Leung has shown that the event which is unusual and which has occurred is his foot slipping on the edge of the floor or the footrest inside the truck when he was alighting from the vehicle. Has Mr. Leung shown that the occurrence of such an event is more consistent with fault on the part of IDS than the absence of fault?
2. There is no evidence as to how the patch of oil or other substance which Mr. Fan had seen on the edge of the floor platform at the side of the front passenger door of the truck came to be there. Neither Mr. Fan nor Mr. Leung gave evidence that they had seen the patch or any other similar stain in the truck before the accident.
3. According to Mr. Leung, the truck would be cleaned only when the driver was free. Mr. Leung claims that IDS did not have a set time for its trucks to be washed and cleaned. Mr. Chin does not dispute this. On his evidence, the truck was supposed to be cleaned by the team members, namely the driver, Mr. Fan and Mr. Leung themselves. There was no fixed policy or strict rule as to how frequently the truck should be cleaned. Mr. Chin said that he recommended to his workers that the truck should be cleaned once a week, but this was not strictly enforced. According to Mr. Chin, however, he would be stationed at the exit when the trucks departed each morning, carrying out random checks on the cleanliness and general condition of the trucks used by IDS for deliveries, and if he found any truck to be dirty, he would inform the team concerned to have the truck cleaned on the following Saturday. Mr. Chin explained that the workers were generally less busy on Saturdays, and were in a position to have the trucks washed and cleaned on Saturday afternoons.
4. Counsel for Mr. Leung relies on Mr. Chin's evidence that he had seen workers eating in the trucks, and that Mr. Chin had not taken action to forbid such practice. It is Counsel's submission that such practice increases the risk of food or drink residue or dirty stains being left in the trucks, creating an unsafe working environment whereby workers are exposed to risks of slippages when they get on or off the trucks. However, there is no evidence from Mr. Leung or Mr. Fan that they, or anyone, had eaten or taken meals inside the truck either on the day of the accident, or before. As Counsel for IDS pointed out, it was never pleaded, nor claimed in the Statements of Mr. Leung or Mr. Fan, that the interior of the truck was dirty as a result of food, drink or meals taken in the truck, and that Mr. Leung had slipped because of stains or dirt left from meals, food or drink consumed in the truck. Counsel for IDS were not in a position to cross examine Mr. Leung or Mr. Fan on this.
5. I accept the submissions made by Counsel for IDS that an employer's duty towards its employees is not absolute (*Ng Kong v. Golden Caterers Ltd.*, HCPI 206/2004 3 February 2005). An employer is not liable for any danger of the workplace which is occasioned by a transient and exceptional condition (*Latimer v. AEC Ltd.* [1953] AC 643). Under the Occupational Safety and Health Ordinance, and employer has to ensure the safety and health at work of its employees, "so far as reasonably practicable". At common law and under its employment contract, IDS has to take reasonable care.
6. Although I accept that it is probable that Mr. Leung had slipped as a result of his stepping on an oily or slippery patch or stain on the footrest inside the truck, there is no evidence on which I can find that the presence of the stain was caused by any negligence or fault on the part of IDS, or in its system. I agree that the cleaning of the interior of the truck is a simple matter and that IDS can reasonably rely on its workers to exercise their own discretion and common and good sense to clean the interior and exterior of the truck used in their delivery rounds. In particular, even if I should accept that the oily patch or stain was caused by the workers eating and drinking inside the vehicle, the workers can reasonably be expected to clean up their own mess instead of relying on IDS to give them instructions on how and when to do this. In the absence of any evidence of any other or similar occurrence of oil stains or food stains having been detected in the truck, or any complaint having been made by anyone as to the condition of the truck prior to the day of the accident, I am unable to conclude that Mr. Leung's unfortunate accident was caused by any negligence or fault on the part of IDS, or anyone in particular. On Mr. Chin's evidence as to IDS' policy on the cleaning of its trucks, I am not satisfied that the accident was caused by IDS' failure to take reasonable or reasonably practicable steps to ensure the safety and health of its employees such as Mr. Leung.
7. Nor do I see any contributory negligence on Mr. Leung's part in the circumstances of the case. Mr. Leung states in his evidence that he feels he was useless or incompetent by reason of the fact that he had occasioned a fall. I see no reason why he should feel inferior, just because he had failed to avoid the accident. Unfortunately, there are accidents which just happen without blame on anyone's part, himself included. Mr. Leung should focus on the positive fact that he has now largely recovered, and can and should get on with his life.
8. Mr. Leung has failed to prove, on a balance of probabilities, that he had sustained his injuries as a result of any negligence or breach of duty on the part of IDS, but in case I am wrong on the question of liability, I shall consider the next issue of quantum.

**What are the damages recoverable by Mr. Leung**

***Pain suffering and loss of amenities***

1. Mr. Leung was 34 years old at the time of the accident. His back, right heel, left foot and middle finger were injured in the fall. He was given sick leave from 17 December 2004 to 21 March 2007, for a total period of 824 days.
2. Dr. Wong and Dr. Lee conducted a joint examination on Mr. Leung on 8 August 2008. They agree that Mr. Leung suffered from sprained injury of the back, sprained injury of his left middle finger and contusion injury of his right heel and left foot. They further agree that there were degenerative changes in Mr. Leung's spine in the L5/S1 region, with lumbar lordosis. Dr. Wong considered that the degeneration had taken place between December 2004 and June 2005, and that the degeneration of the lumbar spine was most likely caused by a back injury which occurred in the accident. Dr. Lee was of the opinion that the degeneration was not solely caused by the injury, which may only have contributed to the degeneration. He considered that the process of degeneration in the lumbar spine should have started before the accident.
3. Dr. Wong and Dr. Lee agreed that their examination revealed that Mr. Leung had recovered well from the injuries to his heel, left foot and left finger. Although they considered that some residual back pain is likely, such pain should be milder than that described by Mr. Leung. Examination showed that there was satisfactory movement of the lower back, satisfactory straight leg raising, without significant neurological deficits, and that there were positive signs of symptom exaggeration. Dr. Lee considered that the objective findings could not support the presence of more than minimal back pain. There was no muscle spasm, and the range of movements of the spine was full. There were multiple non-organic signs.
4. Dr. Wong and Dr. Lee noted that Mr. Leung had suffered from a previous back injury in 1996, and that he further suffered from a sprained injury in October 2002. The doctors considered that part of Mr. Leung's residual back pain may have been caused by his previous injuries.
5. In the light of the evidence, the fact that there was no fracture but that there would nevertheless be some residual back pain, the doctors' finding that Mr. Leung had exaggerated his symptoms, and their opinion on his pre-existing degenerative injury, I will award a sum of **$120,000** for pain, suffering and loss of amenities.

***Pre-trial Loss of earnings***

1. After hearing IDS' evidence on the mistake made in the calculation of Mr. Leung's average monthly income prior to the accident, I accept that his correct average monthly income should be $10,898.
2. Dr. Wong considered that Mr. Leung's condition had become static by 27 April 2006, but was of the opinion that the sick leave granted up to 21 March 2007 was appropriate. In Dr. Lee's opinion, a simple sprained injury to the back takes about 9 to 12 months to recover, and the appropriate sick leave should not be more than 12 months.
3. On the evidence, I am prepared to allow a reasonable period of sick leave up to 27 April 2006, and to allow Mr. Leung's claim for full loss of earnings up to 31 July 2006, which includes a period of 3 months to allow him to secure a new job.
4. Mr. Leung's loss of earnings up to 31 July 2006 (a total of 592 days) would be : $10,898 x 592/30 x 1.05 = **$225,807**.
5. Both Dr. Wong and Dr. Lee considered that Mr. Leung should be able to resume his job as a delivery man, although Dr. Wong considered that Mr. Leung would have reduced working capacity, efficiency and endurance. Dr. Lee pointed out that Mr. Leung would have to exercise care when lifting heavy weights, both as a result of his degenerative spine and his back injuries. Both doctors consider that Mr. Leung could return to work as a driver.
6. Mr. Leung's evidence is that he can no longer lift or carry heavy objects, such as a bag of rice weighing 5kg. It was argued that this would have a significant effect on his ability to resume work as a delivery man, and Mr. Leung's evidence is that he had been unsuccessful in his endeavors through the Labour Department to find a suitable job.
7. I accept the submissions made by Counsel for Mr. Leung that in view of his back injuries, it would be difficult for Mr. Leung to secure a job which involves heavy manual labor. I accept his evidence that Mr. Leung is suitable to work as a general worker or office assistant, and that the average salary for these positions is $8,000. Mr. Leung will therefore suffer a partial loss of salary of $2,898 per month ($10,898 - $8,000). I will further make an award in his favor of **$101,734** ($2,898 x 1003/30 x 1.05), representing his partial loss of earnings up to the date of trial.

***Post-trial loss of earnings***

1. I will allow Mr. Leung's claim for partial loss of earnings, using a multiplier of 13. The award under this head will be: $2,898 x 12 x 13 = **$452,088**.

***Loss of earning capacity***

1. I accept that Mr. Leung will continue to have back pain in the future, and will make an award of **$50,000** under this head.

***Future medical expenses***

1. Dr. Wong's evidence is that the average annual cost of symptomatic treatment for Mr. Leung's residual back pain is $3,000. Mr. Leung claims $30,000, using a multiplier of 10, taking into account Mr. Leung's present age of 38 years. I consider that an appropriate award under this head will be **$24,000.**

***Special damages***

1. These are agreed at **$18,200**.
2. If Mr. Leung succeeds on liability, the total award for damages will be :
   1. PSLA $120,000
   2. Pre-trial loss of earnings & MPF $327,541
   3. Post-trial loss of earnings & MPF $452,088
   4. Loss of earning capacity $ 50,000
   5. Future medical expenses $ 24,000
   6. Special damages $ 18,200

$991,829

LESS

Employees' Compensation received $372,101.11

**Total :** **$619,727.89**

1. If Mr. Leung succeeds on liability, there will be interest on any award of PSLA at the rate of 2% per annual from the date of the writ to the date of judgment, and on the award of special damages at half the judgment rate from the date of the accident to the date of judgment.

**Conclusion**

1. In view of my judgment on liability, Mr. Leung's claims in this action are dismissed. I will make an order nisi that the costs of the action are to be paid by Mr. Leung to IDS, with certificate for counsel, to be taxed if not agreed.

(Mimmie Chan)

District Judge

*Mr. Paul S.Y. Yip, instructed by Messrs. B. Mak & Co., for the Plaintiff*

*Mr. Samuel Chan, instructed by Messrs. Clyde & Co., for the Defendant*