## DCPI 2225/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2225 OF 2012

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##### BETWEEN

CHAN CHEUNG (陳掌) Plaintiff

### and

HONOUR HALL ENGINEERING LIMITED

(安豪工程有限公司)(In liquidation) 1st Defendant

CHINA HARBOUR-PEAKO JOINT VENTURE 2nd Defendant

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Before : Deputy District Judge Anthony Chow in Court

Dates of Hearing : 14 and 16 May 2014

Date of Judgment : 26 May 2014

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JUDGMENT

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*Background*

1. This is a personal injury claim by the plaintiff against his employer, the 1st defendant (the “D1”) a sub-contractor and the 2nd defendant (the “D2”), the principal contractor of certain road work on Pau Chung Street, near the intersection with Ma Tau Kok Road, Kowloon (the “Site”).
2. The Site was approximately 20 meters in length and 3 meters in width.
3. There are a number of allegations in the statement of claim and in Mr Meyrick Wong, plaintiff’s counsel’s, opening submissions that were subsequently discovered as inaccurate from the plaintiff’s own testimony at trial.
4. First, the Site was described as a layby, but under cross examination the plaintiff testified there was no layby on that section of Pau Chung Street.
5. Second, the plastic barriers were described as water-filled type, but the plaintiff clearly described, and by drawing submitted as P-1, the plastic barriers were ordinary barriers not water-filled type barriers.
6. Third, the front end of the layby was described as unfenced, but the plaintiff testified that the Site was fully fenced, with steel barriers on the pedestrian walkway side and with plastic barrier on the traffic side.
7. There were a number of other less important inaccuracies that are too numerous to correct one by one. These inaccuracies made the plaintiff’s case unnecessarily complicated. The problem seems to come from a lack of communication between the plaintiff and his solicitors and Mr Wong is as much a victim of this as the court.
8. To avoid confusion, where the plaintiff’s testimony conflicted with the statement of claim or his witness statement, I will adopt the plaintiff’s testimony as his evidence.

*The accident*

1. It is the plaintiff’s case that on or about 30.12.2009, he was employed as a general labourer on the Site. While he was shoveling dirt into a trench and had his back to the plastic barriers, a vehicle hit the plastic barrier next to him, which in turn pushed the plaintiff down on to the ground.
2. There were some metal bars stored on the ground nearby and the plaintiff’s face landed on one of these metal bars. The plaintiff suffered serious nasal injuries as a result.
3. The vehicle absconded and neither the driver nor the vehicle owner could be traced.

*The claim*

1. The plaintiff claims that his injuries were caused by the negligence of both defendants, breach of their common law duties and those under section 3 of the Occupiers’ Liability Ordinance, Cap 314. Additionally against D1, as the plaintiff’s employer, breach of contract of employment.
2. Originally, the plaintiff also pleaded breach of the Road Traffic (Traffic Control) Regulations, Cap 374G in the statement of claim. Relying his entire case on the assumption that the plastic barrier was the water-filled type and these were not filled properly, Mr Wong, in his opening submission, expressly abandoned this part of the plaintiff’s claim.
3. In any event, even if not expressly abandoned, it was abandoned in fact. No evidence was adduced by the plaintiff on this part of the claim, not even a copy of the Code of Practice for Lighting, Signing and Guarding of Road Works prescribed under Road Traffic (Traffic Control) Regulations, Cap 374G was filed.
4. The plaintiff also relied on the doctrine of res ipsa loquitur.

*D1’s defence*

1. A winding up order was made against the D1 under HCCW 352 of 2011 on 15.2.2012. Irrespective of the winding up order, leave was granted for the plaintiff to continue this proceeding against D1.
2. On 10.4.2013, interlocutory judgment on liability was entered against D1, with damages to be assessed.

*D2’s defence*

1. D2 stated it was not negligent and there was no breach of common law or statutory duties. In the alternative, the plaintiff was contributory negligent in causing his own injuries.
2. D2 also denied that the doctrine of res ipsa loquitur applies.

*Preliminary disputes*

1. Before I discuss the issues in this matter, it is necessary to put aside two preliminary disputes: (1) What was the cause of the plaintiff’s injury; and (2) Is the doctrine of res ipsa loquitur applicable?

*Cause of the injury*

1. In the D2’s witness, Mr Yeung Wing Lau’s witness statement, he stated no one from the D2 witnessed the accident; however, in a Preliminary Accident/Incident Report dated 29.1.2010, the plaintiff was recorded as a member of the traffic patrol team and sustained personal injury through human error when his face hit against the left side mirror of a van lorry in the course of leaving the Site.
2. Later in his witness statement, Mr Yeung also stated in the Notice By Employer of The Death of an Employee or an Accident to an Employee Resulting in Death or Incapacity (the “Form 2 Notice”), it was recorded the plaintiff together with a foreman were replacing the flash lights of the barriers, the plaintiff suffered personal injury when he accidently hit the side mirror of the van.
3. Furthermore, Mr Yeung stated in an Injury Report Form dated 30.1.2010 completed by Mr Leung Wing Fai, the plaintiff sustained minor personal injury to his nose when in an attempt to pull out some materials from a van lorry he lost balance and his face hit against the side mirror of the van lorry.
4. Mr Yeung’s evidence differs from the plaintiff’s on several grounds. Some are relevant and some not so relevant.
5. First, whether the plaintiff was employed as a labourer to move dirt into a trench or as a member of traffic control team is irrelevant.
6. Second, Mr Yeung gave three different versions of how the plaintiff was injured, yet there is no evidence in support of any of these versions.
7. Mr Yeung did not witness the accident; he denied having composed the Preliminary Accident/Incident Report, although it bears his name; the author of the Form 2 Notice is unknown; and Mr Leung, the author of Injury Report Form did not testify.
8. The only evidence that seems to support D2’s version was the medical record of the Eye Department of the United Christian Hospital starting from 5.2.2010. In the consultation note, it was stated: “IOD (*injured on duty*) Nose hit by rear mirror of car with right nasal depression, close reduction done 1/2010…” All subsequent consultation notes from the Eye Department simply copied this first consultation note.
9. Third, contrary to the Eye Department’s consultation note, the Accident & Emergency Department’s triage assessment on the date of the accident stated the plaintiff: “S/F (*suffered from*) Nasal injury = (*around*) 11 AM, ground level”.
10. The Accident & Emergency Department’s triage assessment was recorded immediately after the accident and was clearly consistent with the plaintiff’s version on how the accident occurred. Having carefully considered all of the evidence, I prefer the plaintiff’s version of how the accident occurred.

*Is the doctrine of res ipsa loquitur applicable*

1. In *Sanfield Building Contractors Ltd. v Li Kai Cheong* (2003) 6 HKCFAR 207, Bokhary PJ explained the doctrine as follows:-

“The res ipsa loquitur mode of inferential reasoning comes into play where an accident of unknown cause is one that would not normally happen without negligence on the part of the defendant in control of the object or activity which injured the plaintiff or damaged his property. In such a situation the court is able to infer negligence on the defendant’s part unless he offers an acceptable explanation consistent with his having taken reasonable care.”

1. In *Yu Yu Kai v Chan Chi Keung* (2009) 12 HKCFAR 705 Ribero PJ further explain the doctrine as follows:-

“Whether one uses the label “res ipsa loquitur” or one speaks (as Hobhouse LJ would have preferred) of establishing a prima facie case, one is concerned with a rule regarding the proper approach to the evidence. It is an approach whereby, in cases where the plaintiff is unable to say exactly how his injury was caused but, consonant with his duty of care, one may expect the defendant to know, one asks whether the evidence has raised a prima facie case against the defendant and if it has, whether the defendant has, at the end of the day, dispelled that prima facie case by providing a plausible explanation for the plaintiff’s injury which is consistent with the absence of negligence on his part.”

1. Mr Jerry MS Chung, counsel for D2, argued that res ipsa loquituris not applicable here.
2. Mr Wong submitted that the barrier came loose after being hit must be because it was not strong enough, therefore res ipsa loquitur must be applicable.
3. The problem with Mr Wong’s argument is that if the vehicle is large enough and the speed fast enough, no barrier is strong enough to remain standing. The issue on whether *res ipsa loquitur* is applicable is not whether the barrier was strong enough but whether this accident was one that would not normally happen without negligence on the part of D2?
4. Since this accident occurred as a result of the negligent driver of the vehicle hitting the plastic barrier. This accident is clearly not one that “would not normally happen without negligence on the part of the defendant in control of the object or activity which injured the plaintiff*”.*
5. In view of the fact that the direct cause of the plaintiff’s injury was the vehicle hitting the plastic barrier and in turn hitting the plaintiff, I agree with Mr Chung.
6. Accordingly, the doctrine of res ipsa loquiturdoes not apply and the usual burden of proving: duty, breach and foreseeable damages, remains with the plaintiff.

*The issues*

1. As I see it there is only one issue on the plaintiff’s claim against D2: Was D2 negligent as occupier of the Site?
2. Furthermore, irrespective of whether D2 was negligent, I still have to determine the plaintiff’s damages.

*Issue: Was D2 negligent as occupier of the property?*

1. As usual with all negligent claims, the burden is on the plaintiff to prove the D2 owed him a duty of care; that the D2 was in breach of that duty of care; and as result of that breach, the plaintiff suffered damages that are foreseeable.
2. The plaintiff only advanced one duty of care that the D2 breached. Mr Wong, in his final submission stated the only reason the barrier came loose after being hit by the van was obviously due to its not being strong enough.
3. With respect, that is hardly sufficient. At a minimum, there should be evidence on what type of barrier is reasonably required for similar road works and evidence on what type of barrier was actually used by D2 in order to satisfy the plaintiff’s burden of proof.
4. With the absence of these evidence and because the doctrine of res ipsa loquiturdoes not apply, the plaintiff did not satisfy his burden of proving D2 was in breach of its duty of care and the plaintiff had suffered a foreseeable damages.
5. That should be the end of the plaintiff’s case against D2; however, for completeness, I will continue to analysis the plaintiff’s case as if the doctrine of res ipsa loquitur applies.

*What duty of care did D2 owe to the plaintiff as occupier?*

1. The plaintiff relied on both the common law duty of care and section 3 of the Occupiers’ Liability Ordinance.
2. Section 3 of the Occupiers’ Liability Ordinance states:-

“(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a 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.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-

1. an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-

1. where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
2. where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

1. As to the common law duty of care of an occupier, it is nothing more than the usual duty of what is reasonable under the circumstance. In *Bhana, Angela Mary v Ocean Apex Trading Ltd*. DCPI 1732/2009, Her Honour Judge Mimmie Chan held:-

“It cannot be disputed that the duty of care to visitors is not an absolute duty. The law is succinctly summarized in the Judgment of Megaw LJ in *Ward v. Tesco Stores Ltd*. [1976] 1 WLR 810 at page 815, which passage was quoted by Mayo VP in *Cheung Wai Mei v. The Excelsior Hotel (Hong Kong) Ltd*. CACV 38/2000, 22 November 2000:-

‘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 … When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection for customers.’”

1. Judge Chan further held section 3 of the Occupiers’ Liability Ordinance merely reiterates the common law position. Her Honour wrote further:-

“There is therefore no question of a guarantee of safety for visitors. What is required is for an occupier to have in place a proper and adequate system to provide for the safety of its visitors. Section 3 of the Ordinance provides that an occupier of the premises owes a common duty of care, 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.”

*D2’s duty of care as occupier*

1. As I see it, in the circumstance of this case, D2’s duty of care to the plaintiff is to institute a reasonable system of safety installations, including proper barriers, to safeguard workers who are working within the Site.
2. Mr Yeung testified that the set of safety installation system involving road works is called Temporary Traffic Arrangement (“TTA”).
3. All TTA must follow the following steps for approval:-
   1. The applicant’s traffic consultant must design the TTA in compliance with the Code of Practice for Lighting, Signing and Guarding of Road Works prescribed under Road Traffic (Traffic Control) Regulations, Cap. 374G.
   2. The TTA is then submitted to the Transport Department for their approval.
   3. Once approved, the TTA must be submitted to the government engineer for his endorsement.
   4. Once endorsed, the TTA must then be submitted to the Road Management Office of the Hong Kong Police Department (the “RMO”) for them to schedule the appropriate date to implement the TTA.
   5. On the scheduled date, officer of the RMO will be on site to inspect and ensure the TTA are implemented in accordance with the approved TTA plan.
4. As I have stated above, Mr Wong had expressly abandoned breach of the Road Traffic (Traffic Control) Regulations, Cap 374G as part of the plaintiff’s case.
5. In any event, even if it was not abandoned, and although there is no evidence of what TTA was implemented by D2 for the Site, I find the steps required by the government: design by a traffic consultant; approval by the Transportation Department; endorsement by the government engineer; and inspection by the RMO is prima facie evidence that all TTA’s, including those for the Site, are reasonable safeguards for all concerned including those working inside the work site.
6. Accordingly, even if the doctrine of res ipsa loquitur applies (which is not my finding), D2 has dispelled the prima facie case against it and the burden again falls on the plaintiff.

*Conclusion*

1. The plaintiff have failed to submit any evidence to satisfy his burden of proof, therefore even if the doctrine of res ipsa loquitur applies (which is not my finding), I would find D2 had a reasonable system of safety installations to safeguard workers who are working within the Site, including the plaintiff, and there was no breach of its duty of care.
2. The D2 is therefore not liable to the plaintiff for his injuries.

*What is the plaintiff’s damage?*

1. I now come to the assessment of the plaintiff’s damages.

*PSLA*

1. The joint medical report dated 28.5.2012, compiled by Dr Au Siu Foon and Dr Lo Siu Sing, the respective Ear, Noise Throat specialists for the parties, concluded that the scar and the deformity of the plaintiff’s nose caused 6% impairment to the whole person. The scar and deformity do not prevent the plaintiff from resuming his pre-accident job as a construction site labourer.
2. Mr Wong referred me to the case of *Lo Hin Fong v Chan Chi Shing*, DCPI No. 60 of 2001, where the 50 years old plaintiff suffered a fractured nasal bone after he was assaulted by the defendant. The plaintiff was evaluated to have suffered 1% permanent disability with no loss of earning capacity. The plaintiff was awarded $100,000 for PSLA in 1.8.2002.
3. In addition to *Lo Hing Fong*, Mr Chung referred me to the cases of:-
   1. *Fong Lun Fat v Wong Kuen & Anor*, HCA 820 of 1976, where the plaintiff there suffered facial injuries in a traffic accident. PSLA was assessed at $15,000 ($120,487 in 1998 dollars).
   2. *Lau Kai Tai v Tsang Chor Chau*, HCA 2500 of 1977, where in a traffic accident, the plaintiff suffered a 1 inch haematoma on the right occipital, a linear fracture of the right occipital bone, fractured incisor teeth and a bruised upper lip, permanent and total deaf in the right ear and there was a chance of slight risk of epilepsy. PSLA was assessed at $12,000 ($98,000 in 1998 dollar).
   3. *Wong Wing Sun v Chan Man Kin* [2004] HKLRD (Yrbk) 419, where the plaintiff suffered a minor head injury with amnesia and other injuries after a traffic accident. $220,000 was awarded for PSLA.
4. After careful consideration of the above cases, I agree with Mr Wong’s submission that with 6% impairment to the whole person, the plaintiff should be awarded $250,000 for PSLA.

*Pre-trial loss of earnings*

1. At the time of the accident, the plaintiff was 67 years old and was employed as a construction site labourer earning a monthly salary of $10,295.
2. Between 31.9.2009 to 16.7.2010, the plaintiff was granted medical sick leaves totaling 31 days. The plaintiff should therefore have full loss of income for the period, calculated as follows: $10,295/30 x 31 days = $10,638.
3. The plaintiff alleged that he intended to continue working until he is 70 years old and Mr Wong submitted except for a 20 days period in May 2010 and 5 days in mid-2011, the plaintiff was unable to work due to injuries. The plaintiff claimed a further period of loss of earnings for 787 days or $270,072.
4. In the joint medical report however, the experts concluded:-

“Headache and right post-auricular pain should be due to referred pain from dental caries in his right upper molars and referred pain from his tender right temporo-mandibular joint. They are unrelated to the accident on 30.12.2009. The mild nose pain does not lead to any permanent impairment of the whole person.”

1. There is no mention of any back pain in the joint medical report at all.
2. The experts also concluded:-

“Scar and deformity of the nasal bridge do not prevent (the plaintiff) from resuming his pre-accident job as a construction site labourer.”

1. Having carefully considered all of the evidence, I agree with the experts’ conclusion that the reasonable period of sick leave should be one month.
2. The plaintiff should be awarded pre-trial loss of earnings in the sum of $10,638.

*Loss of MPF*

1. The plaintiff should be awarded loss of MPF as follows:-

$10,638 x 5% = $531.90.

*Special damages*

1. The plaintiff’s claim for special damages are separated into 3 parts:-
   1. Medical expenses $3,000;
   2. Tonic food & pain killers $1,000;
   3. Travel Expenses $1,000.
2. Medical expenses are separated into 2 parts: (a) accounts issued by the United Christian Hospital totaling $490; and (b) receipts issued by Chinese medicine practitioners totaling $1601.
3. Charges by the United Christian Hospital are not disputed and the full amount should be awarded.
4. Charges for Chinese medicine practitioners are however disputed. Mr Chung argued that for most of these receipts, no specific ailments were stated just “中藥” or “中藥連診金”. The other 2 receipts clearly stated the consultation were for “傷風感冒, 鼻道發炎, 頭痛, 頭昏, 咳嗽,” and “頭痛,背痛, 眼痛, 傷風感冒, 肚疴, 嘔” which are typical symptoms of the common cold or the FLU.
5. From the plaintiff’s hospital record, it is disclosed that he also suffers from long term chronic diarrhea, there is no evidence these Chinese medicines were for symptoms related to this accident. Accordingly, no award should be allowed under this part of the claim.
6. As to tonic food, the plaintiff submitted a receipt for “法國腦活素”. This was not prescribed or recommended by a western doctor or a Chinese medicine practitioner. This is also not the traditional type of nourishing food or supplements. This part of the claim is disallowed.
7. As to travel expenses, the plaintiff testified that it costs him $16 per return trip to the United Christian Hospital. Given the fact that there was evidence of 6 trips to the hospital, the plaintiff is entitled to $16 x 6 = $96 for travel expenses.

*Future medical expenses*

1. The plaintiff claims $80,000 for a more complicated surgery to repair “serious deformities” to the bony nasal bridge. In his testimony, the plaintiff testified that he wanted the further surgery because he thinks it may improve his headaches.
2. It is important to note this item of claim is not the close reduction surgery recommended by the doctors at the United Christian Hospital, which the plaintiff had twice refused. This item of claim was in fact added after receipt of the joint medical report, where the experts wrote:-

“If Mr Chan had repeated closed reduction of fractured nasal bone in January 2010 as advised by ENT surgeon of UCH, his nasal profile should look better. By now, simple closed reduction will not work. More complicated surgery is necessary to improve the appearance of his nose. The cost of the operation and subsequent follow-up visits is about $80,000 in private hospital setting.”

1. Clearly in the experts’ opinion, this operation was solely for cosmetic purpose and will not aid the plaintiff’s headaches. In any event, in the expert’s opinion the plaintiff’s headaches were not caused by the accident.
2. I have carefully observed the physical appearance of the plaintiff’s nose and I did not see any excessive deformity that requires attention. Given the fact that the plaintiff is 72 years old at the time of the trial, it is highly unlike that he will go through the pain and trouble to have a purely cosmetic surgery. This item is not allowed.
3. Lastly, the plaintiff received $42,000 compensation in his Employment Compensation claim and this sum should be deducted from the total damages allowed.
4. Total damages assessed as follows:-

PSLA $250,000.00

Pre-trial loss of earnings $10,638.00

Loss of MPF $531.90

Special Damages $586.00

Sub-total $261,755.90

Less: ECC received ($42,000.00)

Total $219,755.90

*Orders*

* 1. Claim against D2 is dismissed.
  2. Costs to D2, to be taxed on a party/party basis, if not agreed.
  3. Damages against D1 are assessed at $219,749.90.
  4. Certificate for counsels be issued.
  5. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

( Anthony Chow )

Deputy District Judge

Mr Meyrick W K Wong, instructed by H L Wong & Co, as assigned by the Director of Legal Aid, for the plaintiff

The 1st Defendant: absent

Mr Jerry M S Chung, instructed by K H Lam & Co, for the 2nd defendant