DCPI 2448 OF 2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 2448 OF 2007**

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

BWTWEEN

LI YUK LAN Plaintiff

and

TAM MAN KWONG trading as WAI SHING

CLEANING COMPANY 1st Defendant

PARK'N SHOP LIMITED 2nd Defendant

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

Coram : H. H. Judge YUNG, District Judge

Dates of Hearing : 8th & 9th December, 2008

# Date of Handing

Down of Judgment : 12 January 2009

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

## J U D G M E N T

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

Background

1. The present claim arose out of an industrial accident. The Plaintiff was the employee of the 1st Defendant. At the time of the accident she was in the course of her employment performing cleaning duty in the car park. When she was picking up paper boxes in the loading area, a metal cage-trolley (“the trolley”) fell from the loading platform and fell on her. As a result she suffered personal injury for which she is now claiming common law damages.
2. A supermarket operated under the name of “Park N Shop” was using the loading platform for its business. The evidence clearly points, to the fact that the trolley belonged to the operator of the supermarket, though it is not clear as to how and why the trolley fell on the Plaintiff. On a without admitting liability basis, the 2nd Defendant has, in the course of the trial, reached settlement with the Plaintiff. The outstanding issue is the claim against the 1st Defendant.

Liability of the 1st Defendant as Occupier

1. Mr. Cheung, Counsel for the 1st Defendant, did not dispute that someone employed by the supermarket caused the trolley to land on the Plaintiff. He contended that there was no evidence that the 1st Defendant was an occupier. He was right. The 1st Defendant was a contractor employed by someone responsible for the building management of the car park. That was about all the evidence. As Mr. Cheung argued, it had not been shown what acts or omissions as an occupier the 1st Defendant was alleged to have been guilty of.
2. While people were working with trolleys in the platform, there was always a probability for a trolley to fall over the unbounded edge to the ground below. Therefore such activity would pose some danger on the persons or visitors present on the area beneath it. A prudent occupier of the car park or of the loading bay (including the platform) would certainly adopt measures of preventing the falling of trolleys, or measures to warn the visitors of such danger. The 1st Defendant was a merely a cleaning contractor. Without more, it cannot be inferred that it was within the power or duty of the 1st Defendant to implement such measures.
3. I do not find the 1st Defendant an occupier. And if contrary to my finding, the 1st Defendant was at the time an occupier, I do not find that it has been proved that the 1st Defendant had been in breach of its duty as an occupier.

Liability of the 1st Defendant as an Employer

1. The Plaintiff’s claim against her employer was based mainly on the failure of the employer to provide a safe system of work. In that regard, Mr. Cheung submitted that the Plaintiff when giving evidence was unable to pinpoint in what way her employer should have done in providing such safe system of work and therefore her claim must fail. I was conscious of the fact that many an employee might not even know what a safe system of work should be. I queried Mr. Cheung whether it was necessary for an employee to know personally what a safe system of work should be before he or she could succeed in this type of claims. Fairly and graciously, Mr. Cheung conceded that it was not so. Ably he clarified his argument. He contended that while the Plaintiff herself might not be able to tell us what a safe system should be, her legal advisers should be and must be able to do so before the claim could succeed.
2. Mr. Poon did not suggest what safe system of work the 1st Defendant should have implemented. He pointed out the danger aforementioned in paragraph 6, with reference to photographs taken of the accident spot. In addition, he relied on the simple evidence of the Plaintiff that her employer had not done anything to protect her. Her evidence may have been vague but the 1st Defendant has not called any evidence as to what protective measure had been taken. I accept the evidence of the Plaintiff. Under these circumstances, I draw the inference that no measures of any kind had been taken to protect the Plaintiff from the danger of working near the loading platform.
3. The 1st Defendant was only required to take reasonable care of his employees. I find he failed to do so. Simple instructions would have absolved him from any negligence. He could have simply instructed the Plaintiff not to work near the loading platform when loading activities were going on. In the absence of such instructions, the Plaintiff or any of his cleaning workers would be under pressure to clean up the loading area. This was foreseeable. Other measures could also have been taken to protect his cleaners. For instance, to arrange a time schedule with the building management so that cleaning work near the platform would only be performed at certain times of the day when there was no loading activities. It is not the function of the court or that of the Plaintiff’s legal adviser to devise a safe system of work for the employer. It suffices for the Plaintiff to prove that a safe system of work had to be in place and it was reasonable for the employer to do so. I find the 1st Defendant negligent in failing to provide a safe system of work.

### Contributory Negligence

1. As a matter of hindsight the Plaintiff could have stopped working and kept away from the platform while loading activities was going on. However, in the absence of instructions that she could have done so, it could not be said that she failed to take reasonable care of her own safety. I do not find her guilty of any contributory negligence. It would have been otherwise, if she was to carry on working, contrary to the instructions of her employer.

### Damages

1. The following items of damages are reasonable and in any event not in dispute: (1) pain and suffering---$150,000  
    (2) Medical expenses---$9,927  
    (3) Nourishing food---$4,000  
    (4) Travelling expenses---$2,000  
    (5) loss of earnings during sick leave---$7420
2. The items in dispute are the pre-trial loss of earnings beyond the sick leave period and future loss of earnings/loss of earning capacity. The Plaintiff was earning about $4,000 a month before the accident. She claimed she could not return to her normal work after the sick leave period.
3. The Plaintiff’s own doctor was of the view that the she was fit to return to work. Her claim that she was totally unemployable was too far fetched. It was true that she might be handicapped in the job market. The extent of the handicap should be slight, looking at the nature of the job she had been doing. An award for pre-trial loss of earnings beyond the sick leave period is not justified and the claim for such is dismissed. As for the handicap she might suffer in the job market, the appropriate award would be for loss of earning capacity. Taking into account her age, menial nature of her work, the nature of the symptoms, I am of the view that a nominal sum of $15,000 is a reasonable award.

#### Orders

1. There be judgment for the Plaintiff against the 1st Defendant for aforementioned amounts with usual interest thereof. There be a costs order nisi in favour of the Plaintiff with certificate for counsel. The Plaintiff do give credit for the sums received from the 2nd Defendant and from the 1st Defendant.

(Y. W. YUNG)

District Judge

Mr. Jackson Poon instructed by M/S B. Mak & Co. for the Plaintiff.

Mr. Kam Cheung instructed by M/S Winnie Leung & Co. for the 1st Defendant.