DCPI 2479/2016

[2019] HKDC 1110

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2479 OF 2016

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BETWEEN:

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| --- | --- |
| YIU YUEN YEE | Plaintiff |
| and |  |
| JOHNSON CLEANING SERVICES  COMPANY LIMITED | Defendant |

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| --- | --- |
| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing: | 11, 12, 13 June 2019 |
| Date of Judgment: | 16 August 2019 |

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JUDGMENT

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1. This is a personal injuries claim brought by the plaintiff who was employed by the defendant as a cleaner (or, according to the defendant, the foreman of cleaners) with regard to an alleged accident at work at Tower 1, The Riverpark, Che Kung Miu Road, Shatin, New Territories, Hong Kong (“the Site”).

*Liability*

1. The plaintiff claimed that, on 19 January 2014, she, as a cleaner, was instructed by a security guard to remove some rubbish at the Site. She went there and found that these were concrete rubble in a sack inside a TV package box left on the side of a road. She could not tell whether these were either rubble from building construction work or renovation work of an individual flat.
2. As it was heavy, she called her supervisor, a Mr. Billy Lam (“Mr. Lam”), to seek help. However, Mr. Lam said, “there is only one person at each post and there is no extra manpower.”
3. The plaintiff fetched a trolley and wheeled the rubble to a skip, and in the process of lifting the rubble over the top of the skip, she injured her left shoulder.
4. Afterwards, she found Mr. Lam at level 3 podium and told him about the injury. Mr. Lam told her to wait for a few days to see if the problem would persist. The plaintiff claimed that a Mr. Wong Kin Fun (“Mr. Wong”) was standing next to Mr. Lam and Mr. Wong also overheard the conversation.
5. The plaintiff then continued to work until one day, she had so much pain that she could not lift her left arm. She informed Mr. Lam but he did not allow her to leave work until after work at 11 pm.
6. The plaintiff attended the A&E of Prince of Wales Hospital (“PWH”) after work but had to wait the whole night until the next day for consultation. She claimed that she would not have suffered as much if she was allowed to see a doctor earlier.
7. The plaintiff also claimed that there were inadequate safety training courses and these were only held on when she was working in another location and, in any case, the lectures were only about “recent injuries” of co-workers in that location.
8. In the Statement of Claim, the plaintiff stated some 18 particulars of negligence and 8 particulars of breach of statutory duty / implied term of contract of employment. As a passing comment, these are clearly excessive and repetitive under the circumstances: the plaintiff’s claim can be boiled down to allegations of failing to provide adequate help, equipment or other safety measures (including safety trainings).
9. The defendant’s case is that the plaintiff was a foreman and thus she would be able to contact and assign other cleaners to assist her but she failed to do so. She also did not contact Mr. Lam at all so he was totally unaware of the situation. Further, the plaintiff’s job duty should not involve clearing construction / renovation debris left by construction workers / decorators. If the defendant was aware of this, it would have informed the relevant parties that the debris should be removed by the workers themselves. The defendant had been providing regular safety training sessions for all the employees at the Riverpark including the plaintiff. These sessions were run by a qualified safety supervisor Mr. Ip Kai Che (“Mr. Ip”).
10. The plaintiff has prepared a witness statement of Mr. Wong but Mr. Wong did not give evidence at trial, so the court only heard evidence from the plaintiff.
11. Further, the court notes that the plaintiff has written and signed an “Employee Injury Report” dated 28 January 2014 (page 167 of the Trial Bundle) which stated (as translated):

*“I, Yiu Yuen Yee, am in charge of the duty of foreman at the Riverpark…”*

*“…(I) arrived at the site and found no colleagues there. I also did not telephone for other colleagues to help and, alone, I put the debris onto the trolley…”*

*“…when I moved the debris into the skip, my left shoulder had a small amount of pain, at the time I thought it was a small problem, so I do not take notice. But after 2 days, I felt the pain getting more severe, I have mentioned to my colleague Mr. Wong that I might have sprained it.”*

*“It was not until 23 January 2014 that I informed supervisor Mr. Lam that I might have sprained my left shoulder.”*

*“It was until 25 January 2014 when I felt that my left shoulder pain getting more severe and I could not even pick things up, so I went to PWH to attend the A&E department…”*

1. This more or less contemporaneous report is clearly inconsistent with what the plaintiff now claims: for example, whether she had contacted Mr. Lam to sought assistance, or whether she had informed Mr. Lam of her injury immediately afterwards etc.
2. In an attempt to explain such inconsistencies, the plaintiff claimed that she was asked to meet with a Mr. Tsang (the defendant’s manager) on 28 January 2014. She said she had in fact told Mr. Tsang the events as stated above in paragraphs 2 to 7 above. Mr. Tsang then prepared a draft for her to copy (as she was not well educated and could not draft the report herself). She noticed the inconsistencies but when she raised these, Mr. Tse told her that if she did not copy his draft word by word, he would not help her claim employees compensation.
3. The plaintiff was asked whether she told anyone about this incident. She at first said “no” and explained that she wanted to keep her job. But then when asked whether she told anyone after she quit the job, she then said she had told “some friends” and also “her lawyers”.
4. This is totally unbelievable. One would reasonably expect that if anyone (whether well-educated or otherwise) was threatened and “forced” to make a false statement to her own detriment, she would likely refuse and seek help immediately, perhaps calling the police etc.. Further, one would expect that this would have been the first thing that she would tell her lawyers. In the current case, the plaintiff never mentioned this “Mr. Tsang event” in her Witness Statement dated 16 January 2018 nor in her Supplemental Witness Statement dated 23 May 2018. She only first mentioned this when giving evidence-in-chief at trial.
5. Further, it is totally unbelievable that Mr. Tsang would have, in such a short time, “edited” a story (some of the alleged “editing” was rather inconsequential like when Mr. Lam was first informed of the injury) and that his “editing” of the date of attendance of PWH A&E happened to match the exact date shown in the A&E record.
6. As Mr. Timothy Lau, Counsel for the defendant, rightly pointed out, if this was a conspiracy by Mr. Tse and the defendant to escape liability in negligence, Mr. Tse could have improvised many more “helpful” details. This would have been a very poor attempt for someone willing to take up the risk of being convicted of a very serious criminal offence for the sake of his employer, and only for saving a sum of compensation money which appeared totally out of proportion to the risk.
7. As such, this report was clearly a more truthful account of the events than what the plaintiff now informed the court. This account of events is also consistent with the defendant’s case, namely that the plaintiff was a foreman, that she did not inform anyone or seek assistance for removing the debris, and that she did not mention the injury to Mr. Lam until a few days after the alleged accident.
8. The defendant has prepared a witness statement from Mr. Lam but he did not attend trial to give evidence, thus the court would not give any weight to his witness statement.
9. Mr. Ip was the defendant’s only witness. He has produced various “Company Training Attendance List” which showed that the plaintiff did attend some of these sessions both in Riverpark and her previous working location (Hong Kong Baptist University).
10. In the training sessions that the plaintiff attended at the Hong Kong Baptist University on 20 June, 18 July and 23 August 2013, each attendance sheet was accompanied by a sheet titled “training content of this period” and on each occasion, such content included a statement that employees should be made aware of proper posture and position when lifting or moving objects.
11. It was further specifically mentioned in the “training content” of 23 August 2013 that employees should be (as I translate) *“aware whether they can handle the weight and the employees should know their own ability so that they would not get sprain or crush injuries because the object was too heavy or that there was improper posture.”*  (Page 162 of the Trial Bundle)
12. There were 3 sets of “Company Training Attendance List” for the Riverpark dated 26 November 2013, 13 December 2013 and 10 January 2014. It appeared that the plaintiff only attended the training on 26 November 2013 (signing up as “foreman”). In each of the accompanying sheet, the “training contents” also included “lifting”.
13. I think this evidence corroborates with Mr. Ip’s evidence that he attended various of the defendant’s sites each at frequency of about once a month to hold such safety training sessions and that the training would always include advice on proper lifting technique etc.
14. I cannot see anything to criticise as far as the safety training provided by the defendant is concerned.
15. There is no question that the plaintiff must be aware of the importance of assessment the weight of the objects and her own ability. Even on her own evidence-in-chief, she admitted that she called Mr. Lam because *“the debris was too heavy and I could not carry myself.”* She claimed that she told Mr. Lam on the phone that, *“I cannot lift it up and told him to find someone to help to lift together.”*
16. I am also convinced from Mr. Ip’s evidence and from the training records that she has been properly trained for proper posture in handling weights. Of course, having a proper posture would not mean that injuries would never happen, especially when lifting something that was *“too heavy”*.
17. In passing, I would add that whether the plaintiff was a foreman or not would not be very relevant to the crux of the case, as I already found that the plaintiff never sought help from anyone irrespective of what power she had in summoning such. However, the plaintiff’s denial simply adds further questions into her credibility.
18. Mr. Ip gave evidence that the decorators should be responsible for removing all the debris before they leave by contracting some removal company with “big guys”. However, he fairly conceded that there were occasions that decorators wanted to save costs and just dumped the debris at public places. The management company would not be able to locate the decorators and could not ask anyone else to remove these, so it would ask the defendant’s cleaners to clear them. But this should not be their duty.
19. Mr. Ip also explained that he never foresaw this situation when the defendant first entered the Site and risk assessment was done. The cleaners were not expected to do any heavy lifting so no lifting equipment (besides the trolley) and heavy manual lifting training and risk assessments etc. were provided.
20. But Mr. Ip also fairly admitted that he was not aware if this situation was rife at the Site because he was not on-site, but the first time he was aware of this practice was when this accident happened. After accident, there was a training session when the cleaners were told that clearing such debris was strictly prohibited. And they have also liaised with the management office that the cleaner would no longer perform such duties, and that if there were such debris, the management office should contact the defendant so that they could arrange removal, and not to ask the cleaners to do so.
21. I find Mr. Ip a reliable witness. He conceded that he was aware of this “dumping” practice (presumably in his experience in other developments) but was not aware if this was rife on the Site. Mr. Lam may know about this but he did not attend to give evidence.
22. As such, from available evidence, I would find that such “dumping practice” must exist at the Site and that it must also be the practice that the management (and the security guard) would ask the cleaners to clear the debris left in public places. The security guard must have approached the plaintiff because she was the foreman. If this was not a usual practice at the Site, I cannot imagine why the plaintiff would receive instructions from the security guard and perform such heavy work. It was clear that, at that stage, she had not been told by the defendant that this was outside her duty and she should refuse such potentially dangerous work that she was untrained for.
23. If this was a usual practice, one would expect that the supervisor, Mr. Lam (and thus the defendant), should be aware of it and such practice should have been stopped by the defendant at the earliest stage. As it happens, remedial measures were only put in after the accident.
24. On the other hand, the plaintiff, having received all the proper trainings for assessing the weight and proper lifting postures etc, should have notified Mr. Lam and other colleagues for assistance. She should not have proceeded on her own.
25. During the trial, the plaintiff claimed that there was some urgency because the debris was left on the road causing some obstruction. But the question must be that, having placed the debris on the trolley, she could have wheeled it to a safe place and then wait until there was assistance before attempting to lift it into the skip (when she allegedly got injured). She admitted that she had not thought of that.
26. Having considered all the available evidence, I would find the defendant liable but that the plaintiff should also be 50% liable for contributory negligence.

*Quantum*

1. At PWH, it was found that she had tenderness over left shoulder with reduced range of motion. X-ray showed no fracture.
2. She was diagnosed as having a sprain and was given an injection and was discharged.
3. Since then, the plaintiff had attended various clinics and underwent physiotherapy.
4. A MRI performed on 30 October 2014 showed “small full thickness tear involving the mid and posterior fibres of the supraspinatus tendon” and “tendinosis of the anterior part of the tendon”.
5. A further MRI was performed on 21 August 2015 which showed, amongst others, full thickness tear of the supraspinatus tendon with moderate muscle atrophy and suspected superior labral tear.
6. The plaintiff underwent a left shoulder arthroscopic cuff repair, superior labral repair and arthroscopic acromioplasty on 22 March 2016.
7. Since then, the plaintiff has undergone many occupational therapy and physiotherapy sessions but she still had residue symptoms and disabilities like intermittent pain in left shoulder, numbness in left shoulder and left hand etc.
8. She had sick leave from 26 January 2014 until 22 May 2017. Since 23 May 2017, she had two jobs working as a cleaner.

*Pain, suffering and loss of amenities*

1. The plaintiff claims HK$ 350,000 under this head in the Revised Statement of Damages although her counsel, Mr. John Wright, revised this to HK$150,000 in his opening submission.
2. In the JMR dated 11 January 2017 (prepared by Dr. Wong Chin Hong and Dr. Yeung Sai Hung), both experts agreed that although there were pre-existing degenerative change in the plaintiff’s left shoulder, the tendon tear was attributable to this accident. Both experts also agree that the treatment (including the surgery) given were appropriate and that her injury had been adequately treated and rehabilitated with no need for further medical or surgical intervention.
3. However, the plaintiff still complained of residual symptoms of intermittent pain, weaknesses and stiffness. I find that these should be mild in nature since she informed the experts that she only took *“pain killers about 2 times per month”* and the experts did not find any objective sign of muscle wasting. The experts also agree that her complaint of numbness was *“unlikely to be related to her left shoulder injury”.*
4. The precedents submitted by both parties appeared to on traumatic soft tissue injuries to shoulder and back but none appeared to involve any surgery. I am of the view that the most comparable case might be the one advanced by Mr. Wright, *Lam Hing Choi v Yip King On and others* HCPI263/2006. This case again did not involve any remedial surgery, but there was a finding of muscle wasting in the shoulder so one might conclude that the residual symptoms were more severe.
5. I would therefore agree with Mr. Wright that the appropriate claim should be HK$150,000 under this head of claim.

*Pre-trial loss of earnings*

1. Both experts endorsed the plaintiff’s sick leave from 26 January 2014 to 20 February 2017 (which was around the time of the joint expert examination when she was still on sick leave). In fact, the plaintiff continued to have sick leave until 22 May 2017. Given that she needed to undergo a remedial surgery on 22 March 2016 and that she had residual symptoms, I find that the sick leave period of roughly 40 months was not unreasonable.
2. There is no dispute that the plaintiff earned HK$11,500 per month prior to the accident. The pre-trial loss of earnings (inclusive of MPF) until 22 May 2017 should be: HK$11,500 x 1.05 x 40 months = HK$483,000
3. Both experts agree that she would have problems returning to her previous job due to residual symptoms and risk of aggravation of pain.
4. The plaintiff took up a job with lighter duties on 23 May 2017 with a salary of HK$5,800 and later switched to another job paying HK$8,000. Mr. Wright proposed that the plaintiff would adopt HK$8,000 as salary that the plaintiff could earn after her injury. I agree.
5. The pre-trial loss of earnings from 23 May 2017 to trial (June 2019), or roughly 25 months, should be: HK$(11,500 – 8,000) x 1.05 x 25 = HK$91,875
6. Thus, the total pre-trial loss of earnings should be HK$(483,000 + 91,875) = HK$574,875

*Future loss of earnings*

1. The plaintiff is now 61 years old. Dr. Wong was of the view that she would work until 65 years but for the accident. Dr. Yeung thought it would likely be 60 years because her physically demanding work.
2. I note that Mr. Ip, very fairly, said that the job nature of a cleaner should not involve lifting heavy weights like clearing construction / renovation debris. I would think that the job of a cleaner may not be as physically demanding as such so I would be generous and adopt Dr. Wong’s opinion.
3. The appropriate multiplier for a 61 year-old retiring at 65 should be 3.78 years. So the future loss of earnings should be HK$(11,500 – 8,000) x 1.05 x 12 x 3.78 = HK$166,698

*Loss of earning capacity*

1. This award was for the risk that the plaintiff might lose her employment and would take longer to regain employment due to a perceived handicap in the labour market.

1. I would allow 3 months of her post-injury salary under this head of claim, or HK$8,000 x 3 = HK$24,000

*Special damages*

1. I would allow the plaintiff’s claim of HK$14,132 as medical expenses and HK$5,000 as travel expenses as stated in the plaintiff’s witness statement. However, I would only allow HK$5,000 under the claim for tonic food. The total under this head should be HK$24,132.
2. In summary:

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| --- | --- |
|  | HK$ |
| PSLA | 150,000 |
| Pre-trial loss of earnings | 574,875 |
| Future loss of earnings | 166,698 |
| Loss of earning capacity | 24,000 |
| Special damages | 24,132 |
| Sub-total: | 939,705 |
| Less: 50% contributory negligence | (469,852.50) |
| Less: ECC | (227,205) |
| Total: | **242,647.50** |

*Interests*

1. Interest on general damages shall be paid at 2% from the date of the writ to the date of the judgment and interest on special damages shall be paid at half judgment rate from the date of the accident to the date of judgment.

*Order*

1. I would therefore order that the defendant shall pay the plaintiff a sum of HK$242,647.50 plus interest. There be an order *nisi* that the costs of the action be to the plaintiff to be taxed if not agreed and the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Mr John Wright, instructed by Massie & Clement, for the plaintiff

Mr Timothy T Y Lau, instructed by Chung & Kwan, for the defendant