#### DCPI 2514/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2514 OF 2012

----------------------------

BETWEEN

YEUNG KAI YUEN Plaintiff

and

CINERENT LIMITED Defendant

----------------------------

##### Before: His Honour Judge Andrew Li in Court

Dates of Hearing: 25, 26 & 28 February 2014

Date of Judgment: 11 April 2014

----------------------------

JUDGMENT

----------------------------

1. This is a personal injury claim brought by the plaintiff against the defendant.

*BACKGROUND*

*The Parties*

1. On Saturday, 24 July 2010, at approximately 12:00 noon, on the pavement outside of Chater House, at the junction between Chater Road and Pedder Street in Central, the plaintiff was electrocuted (“the Accident”).
2. At the time of the Accident, the plaintiff was a driver employed by one Cine Mobile Limited (“Cine Mobile”). He had been so employed by Cine Mobile for approximately 20 years prior to the Accident.
3. The defendant was and is a company incorporated in Hong Kong operating a business renting out filmmaking equipment to production companies (“the defendant”).
4. It is not disputed by the defendant that Cine Mobile belonged to the same group of companies as the defendant: (see para 3(a) of the Defence). Cine Mobile was said to be the transportation limb within the group. Most, if not all, of the clients of the group would engage Cine Mobile to transport filmmaking equipment which they rent from the defendant to different filming locations.
5. Cine Power was a sole proprietorship allegedly also associated with the same group of companies (“Cine Power”). It has allegedly provided a power generator truck (together with its driver) with 2 to 3 logs of power cables at the filming location on the day of the Accident. The defendant denies the fact that Cine Power was its associated company and claims that it has no knowledge as to the provision of the power generation truck, driver and power cables by Cine Power as alleged.
6. RSA Films Asia Limited (“RSA”) has allegedly rented the power generator truck from Cine Power on the day of the Accident. Further, through its agent, Marmarco Company Limited (“Marmarco”), RSA rented certain filmmaking equipment from the defendant. The defendant does not dispute the fact that Marmarco had rented the filmmaking equipment from the defendant on the day of the Accident but claims that it has no knowledge as to the renting of the power generator truck by RSA from Cine Power as alleged.

*The Accident*

1. On the day of the Accident, pursuant to the instructions of his employer, the plaintiff drove a light goods vehicle (“LGV”) from his company address in Kowloon Tong (which it shared with a number of associated companies within the same group with either the prefix “Cine” in English or「先力」in Chinese as their trade names) (hereinafter referred to as “the Cine Group”) and delivered some filmmaking equipment to the aforementioned filmmaking location in Central. At approximately 12:00 noon, after the filmmaking equipment had been unloaded by workers engaged by RSA, the plaintiff intended to leave the scene and was on his way back to his LGV when his left upper limb came into contact with some pedestrian railings. He was electrocuted while he was trying to jump over those pedestrian railings with his hands touching the railings. But for the quick thinking of a colleague who had punched the plaintiff on his chest and thereby separated him from the source of the live electricity, the plaintiff no doubt could have died from the electrocution. Fortunately, the plaintiff only fell on the ground and lost his consciousness and sustained bodily injury as a result.
2. After the Accident, RSA immediately suspended the video shooting; shut down the power supply; summoned for the emergency services and instructed the production crew to find out the cause of the electrocution. Upon investigation undertook by RSA at the scene, it was found that the Accident was caused by a misconnection of electrical wires inside a power cable which allegedly belonged to the defendant.
3. The plaintiff claims that the system of power supply at the scene of the Accident was arranged in the following manner:-
4. the power generator truck, through a series of power cables, provided electricity supply to a switch box to which ultimate power consuming electrical appliances at the filming location were plugged into;
5. each power cable was said to be about 100 feet in length with a connector at each end;
6. each power cable consisted of 5 wires, ie 3 live wires, 1 neutral wire and 1 earth wire;
7. each connector had 5 pins;
8. each wire was connected to one of the specified pins.
9. After the Accident, it was found that the position of the 2nd live wire and the earth wire of one of the power cables had been mistakenly swapped with each other, ie they were connected to the wrong pins. As a result, the earth wire of all the subsequent power cables and the metallic surface of all electrical appliances became charged with high voltage live electricity.
10. Further, after the Accident, it was noticed that some filmmaking equipment with metallic surface had been placed immediately next to and was in contact with the pedestrian railings. This explains why the pedestrian railings were charged with live electricity as a result of an indirect contact with the faulty cable.
11. The plaintiff’s case is that the misconnected power cable which caused the electrocution was owned and supplied by the defendant.

*Agreed items on quantum*

1. On the 1st day of the trial, counsel for the plaintiff and the defendant had, subject to the issue of causation, agreed on a number of items in relation to the quantum in this case. They included:-
2. damages for pain, suffering and loss of amenities (“PSLA”) at HK$250,000;
3. pre-trial loss of earnings at HK$170,852.30; and
4. special damages at HK$20,000.
5. The sums agreed do not include interest for those items. Thus, whatever the court will find at the end of day in terms of quantum, interest will have to be added to the agreed sums as stated above.
6. The claim for future loss of earnings has not been agreed and it is one of the areas hotly in dispute between the parties in relation to the issue of quantum in this case.
7. The advance payments received by the plaintiff during his sick leave period have been agreed at HK$145,379. The plaintiff is prepared to give credit for such sum out of any quantum award which this court may make at the end of the day.

*Issues in dispute*

1. At the outset of this case, Miss Angela Gwilt, counsel for the defendant, informed the court that the defendant contends this case on 2 basis:-
2. that the cable in question which had caused the electrocution did not belong to the defendant (“the ownership issue”);
3. that the plaintiff did not suffer injuries as a result of the Accident (“the causation issue”).
4. On the ownership issue, the gist of the defendant’s case is that eventhough they were on the filming location and had rented out some filmmaking equipment to the production company at the time when the Accident occurred, the cable in question did not belong to them. It claims that it belonged to a company under a separate legal entity which was not related to the defendant. The defendant’s case on this issue is simple: if the faulty cable did not belong to them, they are not liable. However, Miss Gwilt accepts that in the event that the court finds the cable belonged to the defendant, they would accept that the Accident happened to the plaintiff was not too remote and, under those circumstances, the defendant would be liable.
5. In the Defence itself, the defendant tried to place the blame on Cine Power, RSA and Marmarco, none of which is a party to the present proceedings and they had never been joined as a third party by the defendant. In the witness statement of the defendant’s only intended witness Mr Chan Chuk Man (“Chan”), again blame had been cast on Marmarco and extensive reference had been made to the terms of a contract signed between the defendant and Marmarco. Shortly before the trial, the defendant decided it no longer wished to rely on the defence that the Accident was caused by the negligence and/or breach of statutory duties and/or breach of common duty of care on the part of Cine Power, RSA or Marmarco or their employees, servants or agents. The concession was contained in the written Opening of the defendant’s counsel which was lodged with the court a few days prior to the hearing. The claim for indemnity and/or contribution from Cine Power and/or RSA and/or Marmarco was also dropped at the same time.
6. More surprisingly perhaps is the fact that, after hearing the evidence given by the witnesses called by the plaintiff at trial, the defendant, despite having filed the witness statement of Chan earlier in the proceedings, decided not to call Chan to give evidence. Thus, the only evidence on the ownership issue has come from the plaintiff’s side only.
7. On the causation issue, the defendant’s case is that the plaintiff has failed to establish that his shoulder injuries were sustained as a result of the Accident. Again, it has not called any witness to testify on this issue. It relies solely on the opinion of its medical expert Dr Chun Siu Yeung.

*DISCUSSION*

*On Liability*

1. The plaintiff has called a total of 3 witnesses during the trial. They included the plaintiff himself; his former colleague and co-worker Mr Hui Yiu Kwan (“Hui”); and Mr Leung Chung Kit (“Leung”) who is the executor producer of RSA, the production company which had hired the equipment, including the power generator truck and power cables, from the defendant’s group of companies.

*PW1 -- the plaintiff’s evidence*

1. In a nutshell, the plaintiff’s evidence is that he worked for Cine Mobile (「先力影運有限公司」), a sister company of the defendant (「先力電影器材有限公司」). When he first joined Cine Mobile, his main duty was to drive the generator truck to different filming locations. Due to cost cutting by production companies in recent years, the hiring of generator has become less frequent as dry batteries were used instead of live power. Thus, his main duty by the time of the Accident was to drive the LGV to transport equipment. However, due to his previous experience in driving the generator truck, he knew that part of the job of the driver of the truck includes connecting the 3 power cables on the truck to the power generator and switch box. Like most of the generator truck drivers, the plaintiff holds an electrician licence. Thus, it posts no problem for him to handle live electricity.
2. On the day of the Accident, his employer Cine Mobile instructed him to deliver equipment from the company’s base in Kowloon Tong to the location in Central. Casual workers engaged by RSA turned up at the defendant’s depot – situated at the same address as where Cine Mobile was based, ie No. 7 Cumberland Road, Kowloon Tong – to collect, test and then load the hired equipment into wire cages and then onto the LGV.
3. The plaintiff’s understanding is that it was the defendant who had supplied the equipment to RSA. The plaintiff’s job on that day was to assist the casual workers to load the wire cages containing the hired equipment onto the LGV by using the hydraulic tailgate. He would then drive the LGV to the filming location in Central. And upon arrival of the location, he would help to unload the equipment by operating the controls of the tailgate to the LGV. As the equipment would be in thousand in terms of number, the plaintiff did not know exactly what equipment would be rented out to RSA by the defendant. However, he knew that the workers would test out all the lights at the defendant’s depot in order to find out if any of them was not working. Those lights which were not working would be placed on one side. They would use the facilities at the defendant’s depot, namely, the electrical sockets at the premises (as contrast to the power cables and switch box on the generator truck) to do that.
4. Upon arrival of the filming location, the plaintiff helped out with the unloading of the wire cages which contained the equipment. As he was only responsible for driving the LGV on the day, he did not participate in the connecting of the wires and power cables. The driver of the generator truck on that day was Hui (PW2) who does not possess an electrician licence. He did not know exactly whom Hui was employed by. However, as far as the plaintiff is concerned, as long as he worked for “Cine” (「先力」) group of companies, he was a staff of “Cine” (「先力」). He knew that there are a number of companies which belonged to the “Cine” (「先力」) group based in the same address in Kowloon Tong. However, he does not know the exact number as their names are in English although all their Chinese names all started with the characters of 「先力」 (“Cine”). To him, whoever works for “Cine” (「先力」), they work for the “Cine” (「先力」) group of companies.

1. The plaintiff also stated that during his 20 plus years working for “Cine” (「先力」), he had witnessed the defendant purchasing power cables on at least 3 occasions. On each occasion, it was the staff of the defendant who was responsible in the cutting and connecting of those cables. He had never heard or witnessed the defendant purchasing any ready-made power cables during that time. (I note here that the defendant has not produced any document or witness to contradict this important part of the plaintiff’s case). When being challenged by the defendant’s counsel on this in cross-examination, the plaintiff was adamant that he had seen this with his own eyes, namely, it was the defendant who had purchased the cables and it was the workers from the defendant who had cut and connected the cables. As the power cables were delivered through the same door as the work place where he was based, he could identified this clearly.
2. The plaintiff also testified that, prior to the Accident, the defendant did not possess any equipment to test the safety of the electrical cables before renting them out to its customers. It was only after the Accident that the Cine group of companies had purchased an appliance to test out the power cables. Again, such evidence of the plaintiff was not contradicted by any evidence from the defendant. The defendant’s case which was put to the plaintiff during cross-examination is that one can always use the naked eyes to check if the different colours of the wires were connected to the right pins of the cable. The plaintiff does not agree with such suggestion as he thinks that only equipment would able to tell easily if there is any mis-connection.
3. According to the plaintiff, the 3 power cables which were placed on the generator truck by Cine Power were all made in Germany. The defendant, on the other hand, owned power cables which were made in China that were for extension purposes. The cables produced in Germany, which were placed on board of the generator truck, were thinner and lighter and without any jute bundling. For those cables which the plaintiff believed were made in China, they were much thicker and heavier and had jute bundling which were used to wrap around the wires. From the photos taken by Leung after the Accident, it can be seen that the offending cable with the misconnected wires had jutes wrapping around them. Thus, the plaintiff was able to say with some degree of certainty that the misconnected cable had come from the defendant.
4. When this was put to the plaintiff under cross-examination, the plaintiff did not agree with the suggestion of the defendant’s counsel that he would not know about such difference as a driver. In fact, he was able to explain quite clearly to the court why he knew there was a difference. In particular, he said the reason why the lighter cables from Germany were placed on the generator truck was not to cause an overloading as it had a limit on the weight it could carry. As for the heavier and thicker cables with jutes (which the plaintiff believed to be made in China), the jutes would provide extra elasticity so that the cables could be extended longer. As a driver who would sometime drive the generator truck and who possesses an electrician licence, the plaintiff therefore was fully aware of the difference between the 2 types of cables. In short, the thicker and heavier cables with the jute bundling belonged to the defendant and the thinner and lighter cables without the jute bundling belonged to Cine Power who operated the generator truck.
5. On the injuries sustained by him in the Accident, the plaintiff states that after regaining consciousness, he felt pain everywhere and felt his heart was beating very fast. He also sustained injury to his right shoulder although at that time the pain was mainly concentrated on his leg. It was only after the pain in his leg had subsided in hospital that the pain in his right shoulder has become more prominent. He describes the pain was unbearable at the time. The plaintiff was adamant that he had not had any problem with his right shoulder prior to the Accident. Although he had been telling the doctors at the hospital of his shoulder problems, none of the doctors took him seriously. When he was being assessed by the doctors at the medical assessment board arranged by the Labour Department in January 2011, it was found that his shoulder condition could have been caused by the Accident. The plaintiff was therefore sent back to the hospital for treatment to his right shoulder and later underwent an operation. Eventually, the plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board on 19 August 2011 and 24 February 2012. It was concluded by the Board that he suffered electrical shock resulting in (i) atrial fibrillation; and (ii) right shoulder tendinitis with pain.

*PW2 – Hui’s evidence*

1. Hui was the plaintiff’s colleague. According to him, they both worked for the “Cine” (「先力」) group of companies. Hui regarded the plaintiff as his “*Sifu*” or master (「師傅」) in the trade and obviously looked up to him for both his experience and skill in the job.
2. On the day of the Accident, he was responsible for driving the generator truck which belonged to Cine Power. Thus, he was certain that there were 3 “thin and light” cables on board of the generator truck. One of them was used to connect to the generator for the use of RSA while the 2 were used as back-ups. While he agreed that the power cables found on the generator truck belonged to Cine Power, he was not sure and did not think that they were German made. He initially thought that they were made in China when he was asked about this during examination-in-chief. However, what he was able to say with certainly is that those 3 lighter and thinner cables had no jute bundling in them. Thus, save and except from deleting the reference to “Made in Germany” in regard to the 3 cables found on the generator truck in his witness statement, Hui was willing to adopt the rest of his statement as his evidence. However, during cross-examination, Hui was not sure whether those cables found on the truck were made in China.
3. The same reason was given by Hui as to why lighter and thinner cables were placed and used on the generator truck, namely, that due to the heavy weight of the generator already on board of the truck, the cables had to be light in order not to cause any overloading to the vehicle which may lead to a fine. According to Hui, the characteristics of these 3 cables found on board of the generator truck included: (i) there were no jute bundling wrapping around the wires inside the cables; (ii) they were thinner; and (iii) they were lighter. Further, at the connecting point on each of those 3 cables, the registration number of the generator truck was marked on top for identification purposes.
4. Hui admitted that he was not a registered electrician and much of what he was told about where the cables were made came from his colleagues. He later changed this part of his evidence to say that in fact it was the plaintiff who had told him that those cables were made in China. He was however not sure whether the wires for those cables, which he believed were made in China, had jutes wrapped round them or not. However, what he was able to say is that the cables on the truck were different from those rented out by the defendant to the production company.
5. He agreed with the defendant’s counsel suggestion that he did not know if it the defendant’s cables had jutes wrapped around them. However, what he is able to say is that if RSA rented the equipment from “Cine” (「先力」), then the cables would have come from “Cine” (「先力」). Obviously, by looking at the photos itself, Hui would not be able to tell whether they belonged to the defendant or not.

*PW3 – Leung’s evidence*

1. Leung is the executive director of RSA who holds a degree in mechanical engineering from the University of Hong Kong. RSA is a company which was founded in 1968 in the business of international television, films, commercial and music video production.
2. On the day of the Accident, RSA was engaged by an international skin care brand to make a television commercial for one of its products. The video was intended to be shot on the pavement outside Chater House in Central. RSA as the production house was responsible to transform the idea of the advertising agent into a visual product. Leung was the person in charge of all production matters for the project which included communications with all parties concerned and the coordination of manpower, equipment and resources.
3. In terms of filmmaking equipment, RSA, through its affiliated company Marmarco, rented a power supply system, including a generator truck, a power box and main power cables, from Cine Power; rented various filmmaking equipment like illumination system and smaller power cables from the defendant; and engaged Cine Mobile to transport the filmmaking equipment to the filming location.
4. Immediately after the Accident, Leung ordered an investigation into the cause of the electrocution. It was soon found that something was wrong with one of the main power cables supplied by what Leung believed to be either from “Cine Power or Cinerent Limited”. One of the 3 live wires was found to be mistakenly connected to the position of the earth line and the earth line to the position of the live wire. It was Leung who has personally taken photos of the offending cable where the misconnected wires could be clearly seen. Upon discovery of the power cable misconnection, Leung immediately telephoned the “Cine Group” and advised them of the problem. He requested them to immediately replace the power system with another one which they should have checked and safe to use before the video production could continue.
5. According to Leung’s observations, drivers from Cine Mobile have always provided assistance in moving around power supply and filmmaking equipment which RSA rents from the Cine Group. He observed that the Plaintiff had always provided such assistance to others while they are filming on location.
6. Significantly, in evidence-in-chief, Leung states that on the day of the Accident, besides renting equipment (which included the power cables) from Cine Power and the defendant, RSA did not rent any equipment from anybody else.
7. Under cross-examination, Leung agrees with the defendant’s counsel suggestion that RSA had mainly rented smaller items like cameras, camera lens, batteries, magazines, chargers and small power cables from the defendant as listed out in the Hire Sheets provided by the defendant. For the misconnected cable shown in the photos taken by him, Leung agreed that it was about 100 feet in length and was not one of the “smaller cables” listed in the Hire Sheets of the equipment supplied by the defendant.
8. However, Leung emphasized that, as far as RSA is concerned, they had rented all their equipment for the shooting from the Cine Group, including cameras, lighting equipment, generator truck equipment truck and power cables. While within the Cine Group they might have a lot of different companies, but as an end user, they would make their request to the Cine Group and “Cine” (「先力」) would supply all the necessary equipment of which they would pay for. As long as they supply the right equipment requested by his company, Leung would not bother himself with from which company within the Cine Group would supply those equipment. Under cross-examination, he gave an example to the defendant’s counsel that, on the day of the Accident, they would require connecting cables for power supply from the generator truck to the shooting location, his company would not be concerned with itself as to whether the cables had come from the defendant or Cine Mobile. Under such mode of operation, RSA asked the Cine Group to provide such service, including the supply of power cables from the generator truck to the actual shooting position. This Leung confirmed was exactly what the Cine Group did on the day of the Accident.

*Analysis of the evidence*

1. The crux of the defendant’s case on the ownership issue is that the plaintiff has failed to prove on a balance of probabilities of whom did the offending cable belong to as there are simply too many versions given by the plaintiff’s witnesses. The defendant submits that the court cannot be satisfied which one of those versions could be correct. Ms Gwilt submits that the plaintiff has simply failed to discharge the burden he bears to show that the misconnected main cable belonged to the defendant as alleged.
2. I do not agree.
3. While accepting that there are some discrepancies between the evidence of the plaintiff, Hui and Leung, those differences in my view are not difficult to resolve.
4. First, with a great deal of respect to Hui, I find him to be not a very bright witness. While I think he is essentially trying to be truthful, he was rather confused and apparently was overwhelmed by the occasion. He was prepared to accept a lot of things put to him by the defendant’s counsel without as much as thinking through them properly before answering. Further, some of the answers given under cross-examination clearly have contradicted with his own evidence given during evidence-in-chief. It is important to bear in mind that he clearly looked up to the plaintiff as a *“Sifu”* or his “master” in the trade and it seems that he would defer to the plaintiff on matters in relation to his work. As he did not have an electrician licence himself, what he knew about the power cables seems to have come from either the plaintiff or his other colleagues.
5. On the other hand, I find the plaintiff to be a very intelligent, honest and truthful witness. He was able to relay to the court on matters in relation to his work and events happened on the day of Accident in a very fair, moderate and clear manner. He was not prone to exaggeration nor was he prepared to lie to suit his case. Even when things clearly were not in his favour, like the reason why he had chosen to resign from his employer when he reached the age of 65 (which will be discussed in more detail below), he was willing to tell the court what he knew or truly believed.
6. Hence, where there are any discrepancies amongst the evidence of the plaintiff and Hui, I would prefer the evidence given by the plaintiff than that of Hui’s. However, as will be explained later, not all of Hui’s evidence is contradictory or unintelligible. In fact, a great deal of his evidence actually tallies with the plaintiff’s evidence.
7. I also find Leung to be a very articulate and truthful witness. Not only he is a totally independent witness in the sense that he is not in any way connected with the defendant or the plaintiff, he was able to give his evidence in a very clear, cogent and intelligent manner. He has been very helpful.
8. In contrast, the defendant has elected not to give evidence and chosen to keep silence on the ownership issue. While it is perfectly entitled to do so as the burden of proof in a civil case lies throughout with a plaintiff, in choosing to produce no positive evidence or call any witness to testify at the trial on such material matter, adverse inferences can be drawn against it: see *Ng Choi Sang v Chu Yu Tim* [2009] 4 HKLRD 747 at 757-759; *Kao Lee & Yip v Koo Hoi Yan* [2003] 3 HKLRD 296 at para 34; and *Wisniewski v Central Manchester Health Authority* [1998] Lloyd’s Re Med 223 at 240.
9. In my view, the essence of this case is not so much about what the plaintiff or his witnesses might have said in court but what the defendant has chosen not to say. It is clear that that the defendant, as the company who had rented out the filming equipment to RSA and as an associated company of Cine Mobile (the plaintiff and Hui’s employer who provided the transportation) and Cine Power (who had provided the generator trucks and at least some of the power cables) knew exactly to whom the misconnected power cable belonged to. Yet, it decided not to produce any positive evidence to refute the claims of the plaintiff. In my opinion, it lies ill in the mouth of the defendant to even suggest that the plaintiff has failed to prove his case when it chooses to keep quiet on the matter. In my view, the defendant would be in the best position to tell the court who owned the misconnected power cable if it says it was not the owner. The defendant’s deliberate attempt to keep silence on the matter, presumably based on legal advice (as all along Chan was intended to be called as a witness up to the commencement of the trial) allows this court to draw an adverse but yet reasonable inference against it that it has something to hide because most probably it was the true owner of the misconnected cable. I would so draw such inference against the defendant in the absence of any positive evidence coming from it and find that the misconnected cable was owned by the defendant.

*Finding on Liability*

1. However, in my judgment, this case does not have to be decided on drawing adverse inference against the defendant only as there is direct evidence from the plaintiff and his witnesses of where did they think the offending cable had come from.
2. First, Leung has narrowed down the ownership of the misconnected cable to either Cine Power or the defendant in his witness statement which he has adopted in his evidence-in-chief. This was not contradicted by the defendant by any positive evidence when it was clearly in the position to do so. It has also not been suggested to him during cross-examination that the connecting cables were supplied by somebody else other than Cine Power or the defendant. In any event, as Leung has told the court, RSA had hired all the equipment, including the misconnected cable, from the Cine Group on the day of the Accident. There was no other supplier for the equipment supplied for the location on that day. Again, this was not challenged by the defendant. Thus, given the above, I have no difficulty to come to the conclusion that the misconnected cables either belonged to Cine Power or the defendant.

1. Second, the plaintiff himself was adamant that the offending cable belonged to the defendant and not Cine Power or Cine Mobile. He was able to say so because he had witnessed with his own eyes when the cables were delivered to the defendant while working for Cine Mobile, one of the associated companies of the defendant, which shares the same premises as the defendant. He was also able to distinguish the 3 cables that were placed on the generator truck (which he believed belonged to Cine Power) and those which were not placed on the generator truck that were used for extension purposes (which he believed belonged to the defendant). He could make the distinction easily by looking at the cables itself. According to him, those with jute bundling, which were thicker and heavier, belonged to the defendant; and those without jute bundling, which were thinner and lighter, belonged to Cine Power. Again, this was not contradicted by the defendant by way of evidence. While the plaintiff believes the lighter and thinner cables without any jute bundling were made in Germany and those thicker and heavier cables with jute bundling were made in China, something which Hui was not very certain if not rather confused about, in my opinion, they are not important. What is more important is that they are different and that the misconnected cable was one with jute bundling (as was clearly depicted in the photos taken by Leung right after the Accident) and was not one of the 3 thinner and lighter cables which could be found on the generator truck. As the invoice/cash memo from Cine Power to RSA shows, RSA rented those 3 cables, together with the generator truck, from Cine Power on the day of the shooting. Hui confirmed in his evidence that the generator truck which he drove on the day in question carried those 3 cables to the location. He was able to say that those 3 cables do not have any jute bundling.

1. Third, although Hui was not sure of the provenance of the 3 cables on the generator truck he was driving on that day, he was sure that all 3 did not have any jute bundling around the wires. As the 3 cables were on the truck provided by Cine Power, it was perhaps not surprising for him to jump to the conclusion that the offending cable were provided by the defendant as the cables belonged to Cine Power had no jute bundling. When Hui was challenged by the defendant’s counsel on this, Hui accepted that he did not know what equipment was rented from the defendant. However, he says that since RSA had rented the filming equipment from the defendant on the day of the shooting and as the defendant is the only equipment rental company in the Cine Group which rents out such equipment to production companies, he therefore thinks that the cable belonged to the defendant. To my mind, this is a perfectly logical deduction and in the absence of any contrary evidence from the defendant, this is a reasonable conclusion that the court can draw from his evidence.
2. Fourth, Leung’s evidence is that besides the Cine Group, RSA did not hire any equipment from anybody else on the day of the Accident. He told the court that the Hire Sheets exhibited to his witness statements do not reflect all the rented items from the defendant as they only consisted the film shoring and audio equipment only. The lighting equipment, including the power cables, was not shown in those Hire sheets. He agrees that the cables referred to in the Hire Sheets are smaller cables and not the one shown in the photos he had taken after the Accident. While he does not know to whom exactly the misconnected cable belonged to, to him as his company had only hired equipment from the Cine Group on that day, it has to come from one of their companies. As to whom it belonged to, it was not his concern.
3. It has to be borne in mind that we are dealing with a civil case here where the civil standard of proof of proving a case on a balance of probabilities applies. Unlike a criminal matter, where the court has to be satisfied beyond reasonable doubt before a court can convict a defendant of a criminal offence, a judge sitting in a civil matter needs only satisfies himself that so long as the overall evidence tends to till the balance in favour of the plaintiff, then the plaintiff succeeds.

1. In this case, for the aforementioned reasons and on a balance of probabilities, I have little doubt that the misconnected cable belonged to the defendant and as such it was liable to the plaintiff for the electrocution caused to him in the Accident.

*The Caparo Principle*

1. If I am wrong on the above and that the misconnected cable did not belong to the defendant, I am of the opinion that the defendant, as someone who was responsible to hire out equipment to the production company on the day of the shooting, will still be liable under the *Caparo* principle.
2. After a period when the courts had debated over the relationship between foreseeability and proximity and the relevance of policy considerations in the development of the “neighbour principle” following the landmark cases of *Donoghue v Stevenson* [1932] AC 562; *Home Office v Dorset Yacht Co Ltd v Home Office* [1970] AC 1004; *Anns v Merton LBC* [1978] AC 728, the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 laid down what would now be called the “fairness and three stage test”. This was summarized succinctly by Lord Bridge in *Caparo* itself at pp 617H-618B as follows:-

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But…the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope.”

1. In essence, besides looking at foreseeability and proximity, the court also now also looks at fairness, justice and reasonableness in the case to determine whether a duty of care is owed. It has been said that justice and reasonableness is a test of “ordinary reason and common sense”: per Saville J in *Minories Fiance Ltd v Arthur Young (A Firm)* [1989] 2 All ER 105, at 110. The court will not only weight all the relevant factors, it has to exercise judicial judgment in order to determine whether it is right to impose a duty of care.

1. The *Caparo* test has been accepted and applied in numerous cases in the UK since the House of Lords delivered its judgment in February 1990, including the leading cases of *White v Jones* [1993] 3 WLR 730; *McFarlane v Tayside Health Board* [1999] 3 WLR 1301, [2002] 2 AC 59; *Law Society v KPMG Peat Marwick* [2000] 1 WLR 1921; *Darlington Memorial Hospital v NHS Trust* [2002] 2 WLR 1483; *Mitchell v Glasgow City Council* [2009] 3 ALL ER 205.
2. The *Caparo* principle has also been applied in Hong Kong. In the Court of Final Appeal decision in *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14, Bokhary PJ quoted Lord Bridge’s speech in *Caparo* where he stated at p 617G of “the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope.”. Bokhary PJ called this the “foreseeability/proximity/fairness, justice and reasonableness” approach.
3. Bokhary PJ has succinctly summed up the modern approach as to when a party owes another person a duty of care in *Luen Hing Fat* in the following way:

“Ultimately it is necessary to stand back and take a holistic view of foreseeability, proximity and the need to be satisfied that it would be fair, just and reasonable to impose a duty of care. In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, 235E-G Lord Steyn endorsed the statement in the Court of Appeal by Saville LJ (as Lord Saville of Newdigate then was) that “these three matters overlap with each other and are really facets of the same thing”. The relationship between proximity and what is just and reasonable was addressed in the Supreme Court of Canada by McLachlin J (as McLachlin CJ then was) in *Canadian National Railway v Norsk Pacific Steamship Co* [1992] 1 SCR 1021. At p.1152 she said that “the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort.”” [at p 31]

1. Further, the CFA laid down that considerations of fairness, justice and reasonableness were an intrinsic element of the duty of care and could be employed to ground the *imposition* of a duty of care; either where no such duty had previously existed, or where a duty had previously been denied: see §§35-37 of Judgment [at pp 34-35] where *Z v United Kingdom* (2002) 34 EHRR 3; *White v Jones, supra*, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 were considered.
2. In the present case, based on my finding that the defendant was the likely owner of the misconnected cable, it is not difficult to find liability attached whether it was the plaintiff’s direct employer on the day of the Accident or not. Even if it was not the owner of the misconnected cable, I am of the view that the defendant will still be liable under the *Caparo* principle.
3. First, insofar as foreseeability is concerned, there is scant doubt in my mind that the harm in question was foreseeable. Misconnecting earth wires to live wires and vice versa would lead to dire consequences. The danger of electrocution was plain and obvious. Any workers present at the shooting location, including the plaintiff, would be placed under the danger of being electrocuted.
4. Second, there is also the proximity. The plaintiff was on the location on the instructions of his employer, one of the associated companies in the Cine Group which was related to the defendant. He was not an onlooker. He was helping his company in discharging its duties in unloading the hired equipment from the LGV of which he was the driver. He was about to leave the filming location when the Accident happened. It was one of the metallic equipment, likely to have been supplied by the defendant, which acted as a conductor from where the misconnected cable “transmitted” live electricity to the pedestrian railings that has ultimately caused the electrocution. Based on such facts, I am of the view that proximity existed between the plaintiff and the defendant.
5. Third, in my judgment, it is only fair, just and reasonable under the circumstances of this case to hold that a duty of care was owed by the defendant to the plaintiff. As a company responsible for hiring out equipment to the production company on that day in question, the defendant has the responsibility to ensure that all equipment rented out to the production company are safe and in good working condition. In my view, even if the cables belonged to one of its associated companies, the defendant was still under a duty to ensure that the power cables, which carried extremely high voltage of electricity, was connected properly and would not pose a danger to any workers working on the scene. It should not merely rely on the naked eyes of its workers to check if the wires were properly connected. The fact that it had purchased an appliance to test out all the equipment before hiring them out after the occurrence of the Accident (something not challenged by the defendant) is a strong indication that the defendant realized that the previous system of visual checking by workers was inadequate. More importantly perhaps is the point that any misconnected cables would have the dire consequence of leading to loss of life and limb as this case has amply demonstrated. Thus, to protect the vulnerable position of all the workers and personnel working on location, who would not know if the wires were properly connected or not, it is in my view only fair, just and reasonable that a duty of care should be imposed on the defendant even if it was not the owner of the misconnected cable.
6. In the aforestated premises, even if the defendant was not the owner of the misconnected cable, I am of the view that it will still be liable for the Accident.

*On Quantum*

*The causation issue*

1. On the causation issue, the plaintiff’s case is that his shoulder injury was a direct result of the Accident while the defendant denies this and claims that it was, as according to its orthopaedic expert’s opinion, likely to be pre-existing.

1. It is not disputed that the plaintiff sustained an electric shock in the Accident. It is also not disputed that he developed atrial fibrillation which was a form of arrhythmia after the electric shock. However, the plaintiff claims that he had injured his right shoulder when he landed on the ground after the electric shock. He also had bilateral calf pain after the Accident.
2. While in hospital, the treatments given to him mainly concentrating on the cardiac condition. The cardiac condition was managed by antiarrhythmic drug following by a short period of oral anticoagulant for the atrial fibrillation. While there was no recording of right shoulder pain during this period of hospitalization, the plaintiff insisted that he had complained to the doctors of the shoulder pain which the doctors told him to be frozen shoulder, something rather common with people of his age. None of the follow-up records kept by the hospital or clinic revealed that the plaintiff had right shoulder symptoms described by the plaintiff. The first time that the right shoulder symptoms were mentioned was on 21 January 2011 when the plaintiff was seen by the doctors in the medical assessment board. It was the board which had recoded that the plaintiff complained of right shoulder pain since the Accident and considered the possibility of right shoulder tendinities post injury.
3. Hence, from January 2011 onwards, the plaintiff was seen at the orthopaedic specialist clinic for the right shoulder symptoms where he received a short course of physiotherapy. Further, MRI of the right shoulder was performed which revealed partial thickness tear of supraaspinatous tendon of the right shoulder. The condition was initially treated conservatively with an option of surgery for the plaintiff to consider. On 19 April 2012, an operation was carried out to repair a partial tear of the subscapularis and partial tear of the long head of biceps with subluxation noted. Arthroscopic rotator cuff repair was performed and tenotomy of the right biceps tendons was also performed.
4. According to the orthopaedic follow-up records, by about middle of September 2012, which was some 20 weeks after the operation, a reasonable condition of the right shoulder was acquired. The flexion range had been restored. Abduction, as well as internal and external rotation, were mildly limited. Mild weakness was noted in the supraspinatus muscle, and other muscles of the right shoulder revealed satisfactory motor power.
5. Having studied the joint expert report of Dr Arthur Chiang (for the plaintiff) and Dr Chun Siu Yeung (for the defendant) carefully, I prefer the opinion of Dr Chiang than that of Dr Chun. I also accept the evidence given by the plaintiff in relation to the complaints he had regarding the shoulder injuries. I consider that the opinion of Dr Chiang matches the evidence given by the plaintiff perfectly both in terms of the history and symptoms. As said, I find the plaintiff as an honest witness who has related his evidence to the court in a fair and truthful manner. I accept his evidence on the shoulder injuries.
6. It is clear that after the plaintiff’s admission, the doctors at the hospital were concentrating on treating the plaintiff’s cardiac condition and to a lesser extent the bilateral calf pain. I believe that the plaintiff’s shoulder pain and condition had been masked by his other more serious condition at the time. I also believe him when he said that he did not have any previous shoulder symptoms. This is supported by the fact that he was able to carry out his pre-accident which involved with carrying of heavy weight from time to time without any problem prior to the Accident. Further, there is no evidence to suggest that the plaintiff had sustained any shoulder injury prior to the present Accident.
7. I accept Dr Chinag’s opinion when he stated that ‘in partial tear of the supraspinatous muscle, the symptoms might not be significant while performing general activities. It might probably be more obvious when one handles heavy objects especially in lifting to and above the shoulder level repetitively.” I also accept his view that “In (the plaintiff’s) case, there existed the possibility that the initial symptoms might not be significant, but with subsequent handling of heavier objects, the symptoms then became more obvious. This might account for the time lapse of half a year before the doctors first noted the complaints.” I therefore accept Dr Chiang’s conclusion that by taking a combined view of all matters considered, the injury of the right shoulder “was more or much more” likely than not in being arising from the Accident.
8. With greatest respect to Dr Chun, I regret that I cannot accept his much more technical and scientific analysis of the plaintiff’s injury as contained in the Joint Medical Report. I bear in mind that the task of a trial judge in such cases is to apply common sense and not be bogged down by the science of aetiology: see Hunter JA in *Lee Kin Kai v Ocean Tramping Co Ltd t/a Ocean Tramping Workshop* [1991] 2 HKLR 232, at pp 235-236.
9. For the aforestated reasons, on the causation issue, I am satisfied that the plaintiff’s right shoulder injuries were caused by the Accident.

*Future loss of earnings*

1. As stated, the parties have agreed on all the items of damages except for the plaintiff’s claim for loss of future earnings.

1. On this issue, the plaintiff’s evidence is candid and frank. He admits that he has chosen to retire after he reached the age of 65 on 25 December 2013. He spoke to his employer and expressed his wish that he wanted to “withdraw from the firing line”. He told the court that when he reached 65, he felt that he belonged to the “retirement age”. Having worked for Cine Mobile for over 24 years, he wanted to retire and to rest. He was clearly upset with the fact that after working for the same employer for such a long time, they ended up fighting in court over this case. He however does realize that at his age he would not be able to drive as well as the other drivers who are younger and sharper than him. He is afraid that he may meet with accidents on the road due to his age. He therefore worked for Cine Mobile until 1 January 2014 and his employer accepted his resignation due to the above reasons.
2. The plaintiff further admits that on a few occasions after his retirement, when his former employer was unable to find any drivers, he helped out on the jobs at 2 separate locations. In total, he worked on 4 different days in January and February 2014. He was paid on a casual basis and earned around $5,000 on those occasions, including overtime payment. The plaintiff also freely admits that it would be very difficult to find another job at his age. At most, he would only be able to find jobs like a security guard. He admits that even that would be difficult due to his age.
3. The plaintiff says that after the operation to his shoulder and when he returned to work, many of his colleagues would help him out in carrying heavy items as he was not able to do so. He says that after the operation, he gradually was able to recover the strength in his arms but still could not extend them completely. He considers that he has recovered 90% in the functions of his arms but still have around 10% disability due to the injury sustained in the Accident. He was advised by the doctors at the hospital of not to overstretching himself by exerting too much force in his arms and shoulders. He was told that there are 4 screws in his shoulder and any over exerting may lead to the bursting of those screws.
4. The plaintiff also admits that it was him who had volunteered to retire and his employer had not asked him to leave, whether due to his injuries or his age. As far as he knows, there is no rule in his company which requires drivers to retire at 65. At the time of his retirement, he was the oldest driver in the company and no driver has reached the age of 65 yet.
5. In my judgment, it is quite clear that whatever reasons that have led the plaintiff to quit the job with Cine Mobile, they have very little to do with the shoulder injuries he had sustained in the Accident. The evidence suggests that his employer was quite prepared to continue to employ him after his operation and probably would continue to do so had he not chosen to retire when he reached 65. Further, the fact that his employer had asked him to return to work on a causal basis on a number of occasions after his retirement indicates that they consider him as capable of discharging his duties as a driver. Also, there is no suggestion that the plaintiff was not able to work as a driver even after his operation in April 2011. While there are bad feelings between them due to the ongoing litigation, it does not seem that it had prevented the plaintiff from working for his employer for almost 3 years before he chose to retire from his job.
6. For the above reasons, I do not consider that the plaintiff has established that he will suffer any loss of future earnings as a result of the injuries sustained by him in the Accident. I therefore will disallow any claim under this head.

*CONCLUSION*

1. In conclusion, there will be judgment entered against the defendant in the sum of HK$295,473.30 (agreed items of damages at HK$440,852.30 less advance payments received by the plaintiff at HK$145,379) as agreed between the parties in this case.
2. In addition to the above sum, there will be an award for interest for general damages, ie PSLA, at 2% from the date of issue of writ to date of judgment and thereafter at judgment rate. There will also be an award for interest on special damages, ie pre-trial loss of earnings and special damages, at 4% from the date of accident to date of judgment and thereafter at judgment rate.
3. Costs will follow the event. The plaintiff will be entitled to the costs of the action. There will be a costs order nisi against the defendant to pay the costs of the action with certificate for counsel, such costs to be taxed if not agreed on a party and party basis. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. The order nisi will become absolute unless the parties apply to vary the same within 14 days from the date of the order.
4. It remains for me to thank counsel on both sides for their helpful assistance.

# ( Andrew SY Li )

# District Judge

Miss Christina Lee, instructed by Munros, for the plaintiff

Miss Angela Gwilt, instructed by Huen & Partners, for the defendant