

HONG KONG / JUDGMENT

CHAN YIM v. SHING CHEONG CONSTRUCTION LTD

COURT

Court of First Instance

DECIDED

18 June 2007

CASE / FILE NUMBER

HCPI54/2006

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bjbj z gP This is a claim by the plaintiff, now aged 49, for damages for personal injuries arising out of an accident at work on 22 March 2003. AUTONUMOUT A winding up order in respect of the defendant had been made on 23 May 2007. After hearing Mr Ramanathan for the plaintiff and Mr Tsui Kui for the provisional liquidator I granted leave to the plaintiff to proceed with his action. AUTONUMOUT The plaintiff was a general manual worker employed by the defendant company. The work undertaken by the defendant company mainly involved concrete work on public piers. The plaintiff had joined the defendant company at the beginning of January the same year and for most of his employment had been engaged on work at Hung Hom Pier. AUTONUMOUT About three days before the accident, he had been instructed to work at the construction site at 128 Pok Fu Lam Road where the accident occurred. The work in which the plaintiff was involved with others essentially involved drilling and removing the old steep concrete slope face and then preparing the surface before installing new concrete slabs on the slope face. On the day in question, the old concrete surface had been removed leaving some metal rods, which were embedded in the slope, protruding from the surface. The accident occurred when the plaintiff attempted manually to bend one of these protruding rods so that it would not obstruct the laying of the new concrete blocks on the slope. The protruding portion of the rod, which was about two to three feet long, sprung back, striking him in the right eye. AUTONUMOUT It was the plaintiff's evidence that not only were no goggles or other form of eye protection provided by the defendant, but more importantly, no metal cutters or blow torches or other tools were provided which he could have used safely to cut the protruding rods. AUTONUMOUT am satisfied that the failure by the defendant company to provide any such elementary equipment to its workers amounts to a clear breach of its duty of care to the plaintiff to provide a safe system of work. AUTONUMOUT This is not a case where I find any contributory negligence on the part of the plaintiff. The defendant failed to provide him with the equipment which would have enabled him safely to deal with the protruding bars. He cannot be criticized for adopting the method he did. AUTONUMOUT Immediately following the accident, the plaintiff was taken to the Accident and Emergency Department of Queen Mary Hospital for treatment of the injury to his right eye. Examination at the Ophthalmology Department revealed bruises over the medial corner of the

right upper eyelid, with mild vertical diplopia and mild right hypertropia compatible with palsy of the right superior oblique muscle. There was no orbital fracture. He was treated conservatively and discharged home. AUTONUMOUT He thereafter attended regular follow-up at Queen Mary Hospital with the diplopia slightly improving in the first eight to nine months and thereafter remaining the same. He was subsequently provided with prism spectacles for his diplopia, but he apparently only used them when using stairs and not on level ground. He was granted sick leave from the date of the accident (22 March 2003) until 25 November 2003 and then on 22 December 2004 and 26 June 2005, a total of 251 days. AUTONUMOUT He was examined by Dr Paul K.M. Cheung, the single joint ophthalmological expert instructed by both parties. Dr Cheung carried out tests for extra-ocular muscle movement to detect any misalignment of the eyes. There was an absence of any misalignment which would be pre-requisite for diplopia. He carried out a Hess Chart Test which was a more objective test for diplopia. It revealed normal ocular movement apart from a very minimal imbalance in the action of the right superior oblique muscle. He said this After considering the results of all these tests, my opinion is that Mr Chan had almost fully recovered from the injury apart from minimal residual muscle imbalance. There should not be any diplopia. There may be minor discomfort or tiredness of his eyes if he has to look down for extended period of time. The muscle imbalance is of such mild degree that it should not affect Mr Chan s employment prospects. He is able to return to his pre-accident job. His ability of performing daily activities and enjoyment of life is not affected. His working capacity should be close to normal with possible minimal impairment depending on the type of job he performs. His condition is now stable. No further [medical] or surgical treatment is required. AUTONUMOUT He regarded the period of 251 days sick leave as appropriate as the superior oblique muscle would have needed many months to recover. AUTONUMOUT Although Dr Cheung was of the view that the plaintiff could return to his pre-accident job after his sick leave, Mr Ramanathan has argued that the doctor was unaware that the nature of the plaintiff s work sometimes required him to work at a height, particularly when working on piers. The plaintiff s evidence was that due partially to the strain on his eye muscle he had difficulty in keeping good sight of an object and that he was afraid of losing balance and falling into the sea or to the ground. I find that the condition of the plaintiff s eyesight following the accident still does cause him genuine concern about working at height. AUTONUMOUT After his sick leave the plaintiff returned to his employment with the defendant company until around November 2004 when his employment was terminated without notice. During that period of approximately a year, the work he was assigned to perform involved transporting cement which was performed working on level ground. After his dismissal he obtained work as a road cleaning worker and a decoration worker before undertaking decoration contracting work. None of this work involved working at a height. AUTONUMOUT The plaintiff impressed me as someone who was concerned to work and to maximize his earnings. I do not believe that he would have feigned an inability to work at a height when he went back to work with the defendant after his sick leave and when he sought employment thereafter. I note that the report of Dr Haydon John of the Qphthalmology Department of Queen Mary Hospital dated 15 March 2005 (after the termination of the plaintiff s sick leave) said that it was unadvisable for the plaintiff to work at a height. Pain, suffering & loss of amenities (PSLA AUTONUMOUT Ramanathan has referred me to one authority in respect of

damages for PSLA : Kwan Shek Sang v. Chan Kam Wah [2003] 2 HKLRD 697 where Suffiad J in 2003 made an award of \$280,000 under this head. The injury in that case was more serious than that in the present case. The plaintiff in that case was left with corneal scarring in his right eye after a metal fragment had flown into and become embedded in his eye. After surgical removal of the fragment he had been left with impairment of vision in that eye which rendered him only suitable for a job which required only good vision in one eye, namely those not involving depth perception, distance judgment and a full view of vision. AUTONUMOUT The plaintiff in the present case has been more fortunate. Although his injury necessitated a period of 251 days sick leave in order for the superior oblique muscle in his right eye to recover he did not have to undergo surgery. Apart from minimal residual muscle imbalance which causes minor discomfort and tiredness of eyesight if he has to look down for an extended period of time and makes inadvisable for him to work at a height, he has no other lasting illeffects from the accident. In my view, an award of \$230,000 in respect of PSLA is appropriate in this case. Pre-trial loss of earnings AUTONUMOUT The plaintiff's allegation that he was paid \$750 a day during his employment with the defendant is supported by the Form 2, Notice of Accident submitted to the Labour Department and the salary receipt for January 2003 produced by him. His evidence was that he normally worked 26 days a month. Sometimes he would work on Sundays but there would also be days when he could not work because the tide was too high. The salary receipt for January 2003 indicates that he only worked 23 days that month. He said that he also only worked 23 days in February

2003. In my view it will be appropriate to take his average pre-accident earnings at \$18,000 per month (i.e. \$750 x 24 days). AUTONUMOUT The plaintiff was given 251 days sick leave. He is entitled to full loss of earnings during this period, i.e. $\$18,000/30 \times 251$ \$150,600. AUTONUMOUT He resumed work with the defendant after the conclusion of his sick leave on 25 November 2003 and was paid his full wages until the termination of his employment 12 months later. He suffered no loss of earnings during this period. AUTONUMOUT accept that thereafter for the next five months he was able to obtain road cleaning and decoration work on average about 20 days a month, earning approximately \$400 per day. His earnings during that period would have therefore averaged approximately \$8,000 per month. His loss of earnings during those five months would therefore have amounted to $(\$18,000 - \$8,000) \times 5$ \$50,000. AUTONUMOUT Since April or May 2005 he has also been able to obtain decoration subcontracting work. When necessary he has had to employ others to undertake work at a height. He says that he earns about \$10,000 on average now but it can rise to \$12,000 or \$13,000 in good months. In my view, it would be appropriate to take his earning capacity since April/May 2005 at \$11,000 per month. His loss of earnings therefore from May 2005 until trial (25 months) have been $(\$18,000 - \$11,000) \times 25$ \$175,000. AUTONUMOUT The plaintiff's total pre-accident loss of earnings are therefore $(\$150,600 + \$50,000 + \$175,000)$ \$375,600. Post-trial loss of earnings AUTONUMOUT The plaintiff is now aged

49. I accept that a multiplier of 8 is appropriate. His future loss of earnings are therefore (\$18,000 \$11,000) \$672,000. Loss of earning capacity AUTONUMOUT accept that the plaintiff s inability to work at height may handicap him in obtaining employment in the future bearing in mind the nature of his work. In my view an award of \$42,000 (representing six months loss of wages) is appropriate under this head. Loss of MPF benefit AUTONUMOUT The award under this head is : Pre-trial : \$375,000 \$18,750 Post-trial : \$672,000 \$33,600 Total: \$52,350 Special damages AUTONUMOUT accept the plaintiff s claim for \$3,200. Summary AUTONUMOUT access damages as follows :

- (1) PSLA \$230,000
- (2) Pre-trial loss of earnings \$375,600
- (3) Post-trial loss of earnings \$672,000
- (4) Loss MPF benefits \$52,350
- (5) Special damages \$3,200 \$1,333,150 Less : Employees Compensation received \$379,680 Total : \$953,470 AUTONUMOUT give judgment for the plaintiff in the sum of \$953,470 plus interest on damages for PSLA at 2% from the date of service of the writ and interest at half judgment rate on pre-trial loss of earnings and special damages from the date of the accident. The plaintiffs costs to be taxed if not agreed and paid by the defendant. The plaintiff s own costs to be taxed under the Legal Aid Regulations. (P.K.M. Longley) Deputy High Court Judge Mr Ramanathan Kumar, instructed by Messrs Alan Wong & Co., assigned by Legal Aid Department, for the Plaintiff Defendant in person, absent Mr Tsui Ka Kui of Messrs Eli K.K. Tsui & Co., for provisional liq 1udk 1udk P Q R S T U V &`#\$ 4eg* oe/+ UE~f& 4eg* UE~f oe/+ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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