

HONG KONG / JUDGMENT

SINGH SUKHDEV v. GREAT EXPECT DEVELOPMENT LTD

COURT

Court of First Instance

DECIDED

29 November 2007

CASE / FILE NUMBER

HCPI836/2006

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bjbj HCPI 753/2005 & HCPI 836/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NOS. 753 OF 2005 AND 836 OF 2006

BETWEEN SINGH SUKHDEV Plaintiff and GREAT EXPECT DEVELOPMENT LIMITED Defendant

(HEARD TOGETHER) Before : Hon J in Court Dates of Hearing : 16 18 and 22 October 2007 Date of Judgment : 22 October 2007 Date of Handing Down Reasons for Judgment : 29 November 2007

REASONS FOR JUDGMENT

AUTONUMOUT Communication between two parties, be they individuals, organisations, or even nations, is difficult enough even when the parties are speaking the same language or dialect. But when the parties are speaking in different languages or dialects, it would become much more difficult. The trouble is when one party thought the other party knows a little bit of his own dialect and conducted communication in a way thinking the other party would understand, the end result would be difficult to assess. AUTONUMOUT This is the backdrop to the present case. The plaintiff, Mr Sukhdev, came to Hong Kong from India speaking only the Punjabi dialect. That was

1998. He had only finished primary education and knew very little English; he did not know Cantonese at all. In the passage of time when he just started to work in Hong Kong, he began to know a little bit of Cantonese but he was not sure whether he could be understood by the other party and the reverse is also true, i.e. other Cantonese speaking people might not know whether he fully understood what they were saying. AUTONUMOUT In March

1999, the plaintiff began working for a garment factory as a general worker. In August 2001, he worked for one Yoke Profits Construction Company Limited (Yoke Profits) as a general labourer. His work included laying heavy cables at different construction sites. His hours of work were usually between 8 a.m. to 5 p.m. AUTONUMOUT Since 31 July 2002, he, in addition to his daytime job with Yoke Profits, worked for the defendant s warehouse at Tai Po as a general labourer responsible for distribution work of newspapers, magazines and books. The defendant is a subsidiary of Oriental Daily. He worked from 11 p.m. to 7 a.m. as an additional job after the working hours of Yoke Profits. His main duties included loading newspapers in the early hours onto lorries for distribution and sometime unloading books from lorries. First accident AUTONUMOUT The first accident happened on 21 September 2002 at about 1 a.m. By then, the plaintiff had been working in Hong Kong for more than three years and admittedly he spoke some Cantonese. At that time he was asked to unload stacks of books from a lorry. The stack was placed on a wooden pallet. He was using a pallet jack. According to the plaintiff, he brought the pallet jack onto the lower tailboard of the lorry and his co worker, by the name of Ah Fai, controlled the tailboard and raised it to the level of the lorry compartment. He then went in, put the jack under the wooden pallet and pulled it out onto the tailboard, intending the same to be lowered by Ah Fai onto the ground level so that he would pull the jack with the stack of books on the wooden pallet out. AUTONUMOUT However, without prior warning, Ah Fai had lowered the tailboard whilst he was inside the compartment and he therefore fell to the ground by about 1.5 metres when he was pulling out the jack. AUTONUMOUT When the plaintiff was giving evidence, DW2, Mr Fai () was not in court. By the time Lam gave evidence the plaintiff could identify him as and not Ah Lam , the other foreman. DW2 actually is also a foreman himself. The plaintiff alleged that he was the Ah Fai who had negligently lowered down the tailboard whilst he was pulling out the jack. AUTONUMOUT Lam denied that he was working with the plaintiff at that time and said he was in the east wing rather than the west wing where the plaintiff was working. Lam further gave a different version as to the standard practice of unloading stacks of books on a wooden pallet with the help of a jack from a lorry compartment. He said that once the worker entered into the lorry compartment, the standard procedure was for the controller to lower down the tailboard (also known as the tailgate). This was to avoid other vehicles or people from bumping into a raised tailboard. AUTONUMOUT In fact when the tailboard was lowered, there was a drop-down board underneath the tailgate at about 0.5 metre from the end. This is the way for warning other people that the tailgate was there. Lam agreed that if the three sides of the tailboard were painted with florescent paint, it would be safer to warn vehicles or people from crashing or bumping onto a raised tailboard. But he said he had never seen one with such fluorescent painting. AUTONUMOUT After the trial it has been observed that all the trucks of Welcome Supermarket which could be easily seen in the street had tailboard painted with yellow florescent paint on the three sides thereof in order to alert others not to bump into it. The truck used by the defendant as shown in the photographs obviously had no such florescent paint. If florescent paint was used there was no need to lower the tailboard at all for a short while whilst a worker was engaging the jack to pull out the pallet

of books from the truck compartment when such an operation would be within a minute s time any way. This is not an additional point relied on against the defendant. However for reasons stated herein later, I do not accept Lam s version of the standard procedure AUTONUMOUT Lam continued to say that once the worker engaged the jack onto the wooden pallet, he should give signal to the controller to raise the tailboard again before he pulled the jack onto the tailboard. AUTONUMOUT However, he eventually agreed that it would take a worker 5 to 10 seconds to enter into the lorry compartment, engaged the jack onto the wooden pallet and pulled it out backwards onto the tailboard again. The whole operation lasted not more than 15 to 20 seconds. However, it will take at least five seconds to lower down the tailgate onto the ground and raise it again for a longer period of about 10 seconds. In other words, there was absolutely no need to lower down the tailgate once the worker entered the compartment for a short while, intending to engage the jack in order to pull out the load of books. AUTONUMOUT In the end, I accept the evidence of the plaintiff that the tailgate should not be lowered until the worker pull out the jack onto the tailboard with the load of books. I accept the submission of Mr John Wright, counsel for the plaintiff that the so-called safety measure, according to the so-called standard procedure of the defendant, was a made up version in order to explain why the tailboard was lowered when the plaintiff was pulling out the tailgate. In other words, I find that the plaintiff could and actually did assume that the tailboard was in line with the lorry compartment when he was pulling out the jack. He was not contributorily negligent in not looking back to ensure the tailboard was raised again. AUTONUMOUT The defence also suggested that the plaintiff was working alone himself. I cannot accept such a version either. If the plaintiff was working alone, there was absolutely no reason why, after the tailboard was raised by his handling of the control bar at the side of the lorry compartment, he should lower the tailgate himself after he entered the compartment. The defence suggested that after he had lowered the tailgate, according to the so-called standard procedure , he forgot about it and pulled the jack out without raising the tailgate again. This was the explanation suggested by the defence as to why the plaintiff fell from the lorry. In those photographs produced by the defence in order to illustrate this so called standard procedure , the two workers therein were apparently laughing mockingly. I find the suggestion of the defence to be a bit preposterous. AUTONUMOUT In the end, I find that the defendant was fully responsible in liability for the first accident. Post first accident AUTONUMOUT On the day after the first accident, i.e. September 2002, the plaintiff did not go to work because of his lower back pain. He went to see a Chinese bonesetter for treatment. However the pain persisted and he attended the Accident & Emergency Department (Dept.) of Queen Elizabeth Hospital () the next day, 22 September 2002. He was examined and was found to have tenderness along his back. The x-ray of lumbo-sacral spine and thoracic spine showed no fracture. The clinical diagnoses was back injury. He re-attended the department on 24 September 2002 for persistent pain. Sick leave was recommended by the attending doctor from 22 to 29 September 2002 inclusive. AUTONUMOUT It was however recorded by the doctor attending him at the A&E Dept. on 22 September 2002 that the plaintiff said that he slipped and fell and landed on his back . But the plaintiff, when applied for injury leave to the defendant on

24 September 2002, was interviewed by DW1, Mr Ming, for the purpose for compiling an employee injury statement report. The record showed that the plaintiff gave similar description as to how the accident had occurred which is in line with his evidence in court, without saying that he fell from the truck because of slippery or he fell from the truck because he slipped. AUTONUMOUT The defence alleged that the plaintiff's version in respect of the first accident was not entirely credible according to the first information recorded in the A&E Dept. one day after the accident. The plaintiff's explanation was that he encountered communication problem with the doctor at the A&E Dept. AUTONUMOUT noted that more than two years later when the plaintiff attended Yan Chai Hospital on 14 October 2004, the comment from the attending doctor was that As this is a chronic problem and there is communication problem with patient, patient was asked to come with friends for communication next time. Physical examination was arranged next visit due to difficulty in communication at that consultation AUTONUMOUT For the aforesaid reason I accept the plaintiff's explanation. Even the doctor in October 2004 found that it was difficult to communicate with the plaintiff, presumably in Cantonese. AUTONUMOUT This problem of communication has been running through the whole case even sometimes when the plaintiff attended the hospital with a friend who acted as an amateur interpreter for him. The plaintiff could not say how accurate would be the interpretation and the standard of interpretation of his friend. I noted even for the court freelance Punjabi interpreter, with due respect to him, there were several occasions whereby even the interpreter did not quite understand what the plaintiff was saying and had to clarify with him in Punjabi first. Further, the English translation of what purport to be said by the plaintiff sometimes was not comprehensible to me. If that could be said of an accepted court interpreter, I wonder how much could be lost in translation. In the end I found the plaintiff's contention that he had communication problem even sometimes with an interpreter is not groundless. Thus it would be impossible for him to go around without an interpreter. His standard of Cantonese was not good enough even by October 2004. AUTONUMOUT The plaintiff said due to language barrier and communication problem at the hospital, he went back to India on 27 September 2002 for treatment. He saw a private doctor in Ludhiana, Punjab in India. He was admitted to an orthopedic clinic and was treated by an orthopedic surgeon. He was there for 10 to 15 days and was given medication and injection by way of treatment. Eventually he was granted sick leave until 28 December 2002. I found that it is not unreasonable for the plaintiff to return to India for treatment. AUTONUMOUT The plaintiff returned to Hong Kong on 27 December 2002. He said the pain in his back had improved slightly so he resumed working with the defendant on 29 December 2002. He signed a letter to the defendant on the same day. There might probably be a mistake in the letter when he said that the sick leave period was from 22 September to 29 September 2002. He might mean 29 December which was the date he signed that letter. The certificate of assessment by the Employees Compensation (Ordinary Assessment) Board dated 2 July 2003 also said that his absence from duty from 22 September 2002 to 28 December 2002 was necessary as a result of the injury. AUTONUMOUT On or about 4 or 5 January 2003 he also returned to his daytime job with Yoke Profits. He said that he still suffered from pain in the back.

However that was a period when he was applying for his wife to come to Hong Kong and he therefore would like to be more gainfully employed with sufficient financial evidence to support his application. Thus he endured his painful condition for quite some time.

AUTONUMOUT However on 26 May 2003 he again attended the A&E Dept. of QEH and was granted sick leave from 26 to 28 May 2003. Again, on 19 August 2003, he attended QEH again and was granted sick leave until 21 August 2003. This showed that the plaintiff was having intermitant back pain as a result of his first accident. The second accident AUTONUMOUT

After the plaintiff resumed working for the defendant on 29 December 2002, he worked until 19 July 2004. On that day he arrived at the Tai Po Factory at about 11:00 p.m. He was assigned by the foreman by the name of to take bundles of newspapers from a conveyancing belt which was inserted about two-thirds of the length of the truck. His job was to place them onto the back of the truck. AUTONUMOUT Previously in the week prior to this date, there were three workers on duty. The other two were his brother and a Chinese guy. The plaintiff could not now recall his name. The Chinese guy had quitted the job and his brother was not working that day. Thus at the time of the second accident he was working alone. AUTONUMOUT Each bundle of newspapers was about 10 to 12 kilograms. The newspapers were wrapped with a plastic tape. Since the plaintiff had to carry the bundles from the conveyancing belt alone, he therefore had to carry one bundle in each hand by grasping one end of the tape. He worked for nearly two hours until 1 a.m. While he was taking two bundles of newspapers off the conveyor belt, he walked to the front of the truck and put them down onto the floor of the truck. He felt a sudden pain in his lower back. He therefore stopped immediately, got off the back of the truck and informed the manager by the name of Ah Cheung. He was told to take a brief rest.

AUTONUMOUT The defence suggested that the plaintiff could have thrown the bundles of newspapers onto the floor and did not have to bend his back. I find that suggestion also a bit preposterous. The plaintiff had to stack the newspapers properly up to the height of about 1.5 metres. Throwing newspapers onto the floor would create an irregular stack which would tumble down when they were not properly placed on top of one another.

AUTONUMOUT have no doubt that the defendant is liable when no sufficient co workers were provided to assist the plaintiff. The bundles were placed at about 30 to 40 cm apart when they were conveying into the truck at a speed of about 8 to 10 bundles per minute. That would mean that the plaintiff would have to handle each bundle in 6 to 7 seconds time. In other words, when he was pulling out two bundles at one time for want of a co worker, he would have to pull out two bundles in 12 to 15 seconds time. That would have been going on for two hours by the time he was injured. The distribution work of newspapers in the early hours of the morning no doubt was quite pressing so that distributors could receive the same in the early hours before the sale at about 6 a.m. onwards. AUTONUMOUT

Accordingly if the accident happened in the way described by the plaintiff, I have no doubt that the system of work and the lack of provisions of co worker and sufficient rest time would render the defendant liable. AUTONUMOUT said if the accident happened in the way as the plaintiff had described because the defence alleged that there was no such accident as contended by the plaintiff since the plaintiff did not officially, or according to the

defendant's procedure, reported the accident. I accept the plaintiff's version of the second accident and will deal with those events after this accident now. Events happened after the second accident AUTONUMOUT The plaintiff said that he was asked by Ah Cheung to take a rest, and he did not work until he went off duty at about 6 a.m. and went back home in Tsuen Wan. As he felt very painful at the back he walked to Yan Chai Hospital near his home which was just 15 minutes walk away. That was 7:14 a.m. on 20 July 2004. Eventually the plaintiff was granted leave from 20 July 2004 up to and including 11 November 2004. AUTONUMOUT According to the record of the defendant, the plaintiff previously had two days sick leave on 29 and 30 June 2004 and another four days from 1 to 4 July 2004. For the second accident, the plaintiff actually was granted sick leave at first from 20 to 31 July 2004 for 12 days. The defence alleged that if he was injured on 20 July 2004, he should apply for injury leave. AUTONUMOUT The record also showed that the plaintiff immediately thereafter applied for casual leave from 1 August 2004 to 15 September 2004 for a total of 46 days. Under the remarks column of this application for casual leave, it was written in English as follows

1. If you don't report duty after the leave or no further application for the extension of leave, your contract will be terminated.
2. And you need to compensate the payment in lieu.
3. All medical expense is paid by Sukhdev [i.e. the plaintiff] himself. The plaintiff signed his name thereunder. AUTONUMOUT According to the plaintiff, he went to India at the end of July 2004 to seek medical treatment at one Tarlok Hospital because again he had communication/language problem. MRI was performed on him on 23 August 2004. He had reported his injury to Ah Cheung as aforesaid but then in the forms of application for leave, it was stated under sick leave and not injury leave. However, it is quite evident that from the third application for leave dated 30 July 2004, in particular the third paragraph, the defendant was aware that he was seeking medical treatment for this long leave of 46 days back in India. According to the plaintiff, he was told that the company would not pay his medical expenses unless he could produce a valid receipt afterwards. AUTONUMOUT In the MRI report dated 23 August 2004, it was said that there was spondylotic changes over L4/5 and L5/S1. During his sick leave periods, he had attended several private doctors, Caritas Medical Centre, Smart Care Medical Centre and Yan Chai Hospital and was examined by various doctors. The aforesaid MRI report dated 23 August 2004 was also shown to doctors in Yan Chai Hospital. The medical report dated 8 February 2005 prepared by Doctor Chan Han also referred to the fact that the plaintiff had done MRI in private which showed minimal posterior disc budge at L1-2, L2-3 level and spondylotic change at L4/5, L5/S1 levels. It was this Doctor Chan who said in the same report that there was communication problem with the plaintiff and he was asked to come with friends for communication next time as aforesaid. AUTONUMOUT accept the plaintiff's evidence that he was injured on 20 July 2004 in the early hours of about 1 a.m. The fact that he had injured his back in the first accident is also conducive to his second accident when he was assigned to work alone for two hours in

lifting up two bundles of newspapers and stacking them up in the goods compartment of the truck. AUTONUMOUT In the end I find the liability of the defendant for the second accident established by the plaintiff. Injury and damage AUTONUMOUT After the plaintiff ceased working for the defendant, he continued to work with Yoke Profits until 23 November 2005. By then he had unfortunately a third accident and he injured his knee. That had recovered after two to three months. Thereafter he could only work as a casual worker making about \$7,000 to \$8,000 a month. However, by May 2006 he began to work for Pizza Hut as a delivery worker. His monthly salary was about \$8,275 until the date of the trial. AUTONUMOUT In the end I find the plaintiff's two accidents on 21 September 2002 and 20 July 2004 were both caused by the negligence, breach of contract on the employment and breach of statutory duty of the defendant. AUTONUMOUT The plaintiff complained that he still has pain and numbness in the legs after certain prolonged activity, e.g. walking over 10 minutes or lifting heavy objects. The MIR scan definitely revealed that he had lumbar disc pathology with bulging lumbar discs and compression of nerve roots. He had pre-existing degeneration of the spine. AUTONUMOUT Danny Tsoi opined that it was likely that the L4/5 and L5/S1 disc protrusions were the source of lower back pain. Either of both accidents could trigger off the onset of symptoms on the degenerative discs. AUTONUMOUT I accept the submissions of counsel for the plaintiff that the plaintiff had a steady work record since arriving in Hong Kong. He had worked for the defendant for over two years and for Yoke Profits between August 2001 and 24 November 2005. He had been described by Lee Hung, i.e. formerly Yoke Profits, to the Director of Immigration in a letter dated 1 June 2005 that he was a very hardworking and helpful person. He actually returned to work for both jobs after the first accident and even returned to the construction job after the second accident. Thus I accept that the plaintiff would not leave the two pre-accident jobs unless he had genuine pain in his lower back. He therefore is not a malingerer. It is not a case of minor sprain to his lower back. In fact his work for Pizza Hut as a scooter driver since May 2006 seemed to suit him very much since this will not as labourous as the work of a construction worker or the delivery labourer as he was for the defendant. Pain, suffering and loss of amenities (PSLA) AUTONUMOUT Several cases were sighted by counsel of the plaintiff and they ranged from \$180,000 to \$300,000 for injury to the lower back. I find the condition of the plaintiff to be a little bit less than those conditions cited in the authorities and I therefore award \$150,000 under this heading. Loss of earnings AUTONUMOUT Before the two accidents the plaintiff was earning about \$21,280 per month plus overtime on average, i.e. \$5,500 with the defendant and about \$15,780 with Yoke Profits. After the second accident he earned a reduced salary of about \$11,000 per month until the end of February 2005, and thereafter about \$11,700 per month until 24 November 2005. He then earned about \$7,000 to \$8,000 per month until May

2006. Thereafter he has been earning about \$8,275 per month with Pizza Hut until the date of the judgment and continuing. Pre-trial loss of earnings AUTONUMOUT

- a) Full loss of earnings : 184 days sick leave @\$21,280 per month. $\$21,280 \times 12 + 5\% \text{ MPF} \times 184365 = \$135,166$
- b) Partial loss of earnings : But for the accident the plaintiff would have earned :
- (i) With the defendant : From 22 November 2004 to say, 21 October 2007 35 months $\times \$5,500 + 5\% \text{ MPF} = \$202,125$ (ii) With Yoke Profits and Lee Hung : From 22 November 2005 to 21 October 2007 Less 3 months due to his unrelated knee injury, i.e. months $\times \$15,780 + 5\% \text{ MPF} = \$315,600 + \$15,780 = \$331,380$

Subtotal \$668,671 Less approximate actual earnings :

- (i) Average \$11,350 per month + 5% MPF From 22 November 2004 to 24 November 2005 say, 12 months = \$136,200 (ii) 25 November to 30 April 2006 Average \$7,500 per month for say, 5 months = \$37,500 (iii) 1 May 2006 to present, 21 October 2007 (Pizza Hut) say, 18 months : $\$8,275 + 5\% \text{ MPF} \times 18 = \$156,397$

Subtotal = \$330,097 Net partial loss of earnings : \$668,671 \$330,097 Total net pre-trial loss of earnings : \$338,574 Future loss of earnings AUTONUMOUT The plaintiff currently earns \$8,275 per month. I accept the submission of his counsel that but for the plaintiff's injuries he would have been able to earn about \$21,280 per month for about half of the remainder of his working life. With a multiplier of about 15 years for a 28-year-old man, the calculation is : $\$21,280 \times \$8,275 = \$13,005 \times 12 \times 15 = \$1,170,450 + 5\% \text{ MPF} = \$1,228,972$ Loss of earning capacity AUTONUMOUT The plaintiff has a permanent handicap and has to face a real or substantial risk of losing his present job and becoming unemployed in future. He is young and the compensation should reflect the remainder of his working life. He claims the rough equivalent of 12 months salary @\$8,275. I find that to be reasonable and would award the rough sum of \$100,000 Special Damages AUTONUMOUT The plaintiff claims medical and travel expenses for the total sum of \$51,000. I find that it was reasonable for the plaintiff to seek treatment in India because he could not communicate with Hong Kong doctors. It was also reasonable to seek private treatment given the delays inherent in the Hospital Authority waiting lists. = \$51,000 Summary AUTONUMOUT PSLA \$150,000.00 Pre-trial loss of earnings plus MPF 338,574.00 Future loss of earnings plus MPF 1,228,972.00 Loss of earning capacity 100,000.00 Special damages 51,000.00

Total \$1,868,546.00 Less the amount already received by the plaintiff under employee compensation \$67,541.50

\$1,801,004.50

Conclusion

AUTONUMOUT For the aforesaid reason I gave judgment for the sum of \$1,801,005. Interest
AUTONUMOUT Interest is payable on PSLA at 2% from the date of issue of writ in the second
action and on pre-trial pecuniary loss (loss of pre-trial earnings and special damages) at half
judgment rate from the date of the second accident until judgment. (D. Yam) Judge of the Court of
First Instance, High Court Mr John Wright, instructed by Messrs John M. Pickavant & Co., for the
Plaintiff Mr Joeson Wong, instructed by Messrs Day & Chan, for the Defendant PAGE - PAGE 1udk
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