

HONG KONG / JUDGMENT

YIP CHI v. WAI LUEN MACHINE WORKS ENGINEERING LTD

COURT

District Court

DECIDED

27 March 2007

CASE / FILE NUMBER

DCPI683/2006

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bjbj DCPI 683/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION DCPI NO. 683 OF FORMTEXT 6

BETWEEN YIP CHI Plaintiff and WAI LUEN MACHINE WORKS ENGINEERING LIMITED
Defendant

Coram: Deputy District Judge Abu B. bin Wahab Date of Hearing: 12, 13, 14 and 15 February 2007
Date of Decision: 27 March 2007

JUDGMENT

This is a claim for damages for personal injuries suffered during work at about 11.30 a.m. on 26 March 2004. The claim is for \$900,318.33. It was finally agreed that the Defendant should in any event be given credit for the sum of \$100,021 paid pursuant to the Employees Compensation Ordinance, Cap. 282. The Plaintiff was his own key witness. The Defendant called as witnesses 2 foremen or supervisors who were on duty that morning. They are Mr. Lam () and Mr. Cheung (). DW2 was the more senior in rank. I disbelieve the Plaintiff. I prefer the evidence of DW1 and DW2. I dismiss the present claim. I make an order nisi that the Plaintiff is to bear costs of the whole proceedings, such costs to be taxed if not agreed. There will be certificate for Counsel. I will explain my decision in the paragraphs that follow. Plaintiff's case the incident The Plaintiff is an experienced welder. Up to the morning in question, the Defendant had been employing him for about 3 months.

5. The Plaintiff attended work at the Defendant's Workshop at about 8.30 a.m. At around 11.30 a.m. he received instructions from a colleague, Ah Ming, to transport angle iron bars from the entrance to inside the Workshop to weld. This covered a distance of 8 to 10 metres.
6. There was a hoist for moving the bars to where welding was to be done. The mechanical part of the hoist (the machinery. See Trial Bundle page B023) was attached to rails on the ceiling. Lines descended from the machinery to hold whatever needed transporting. The bars were trussed up and suspended from these lines about 1 metre above ground. The control-panel for the hoist was linked to the machinery by a cable. The control-panel would reach to about knee level of the operator. By pressing buttons on the control-panel, the hoist would move forward, backward, left or right along the rails. The hoist would stop moving if no button was pressed. Due to the length of the cable for the control-panel, anyone operating the hoist had to walk with the hoist/ its load during transport. As the Plaintiff transported the bars using the hoist, he walked along passageways in the Workshop. The passageways were narrow, about 1 metre in width. The floor of the Workshop, including the passageways, was littered with metal rods or metal pieces. A cleaner used to work to clear the floor. This cleaner left the Defendant about a month earlier with no replacement. The Plaintiff had voiced in vain his concerns to Ah Ming about the littering of the Workshop and the need to employ a cleaner. The Plaintiff had to keep his eyes on the machinery during the transportation process. At one point, the Plaintiff had to walk on metal sheets that raised him to about 1.5 feet from floor level. When he came to near his destination, the Plaintiff had to step down from the metal sheets. He looked at the floor before doing so and got to floor level without mishap. He continued the transporting. When the Plaintiff took his second step, he stepped on (what he discovered later to be) a metal rod about 1 inch in diameter and 1 foot long. The Plaintiff slipped backwards. His right scapula hit the corner of a moulding-machine that had been put there temporarily. His right elbow hit a metal plate that was placed against this machine. The Plaintiff felt pain. He found that he could no longer lift his right arm. He used his left hand to contact through his mobile telephone the Defendant's accountant, a Miss Lui. He told her that he would go see a doctor because he felt uncomfortable after bumping into a machine. At about this time, Michael (a colleague and a relative of the proprietor of the Defendant) emerged from a toilet nearby. The Plaintiff told him his plight in similar terms. The Plaintiff left the Workshop. He took a taxi and went to the Accident and Emergency Department of Tuen Mun Hospital where he queued for medical treatment. Defendant's case It was within the duties of DW1 and DW2 to supervise workers in the Workshop. The 2 would thus patrol the Workshop. DW2 was tasked to fire the Plaintiff that afternoon. DW2 made it a point to instruct the Plaintiff to work only at the outer part of the Workshop and not inside. Neither he nor DW1 instructed the Plaintiff to transport angle iron bars to inside the Workshop. At around 11 a.m. the Plaintiff was seen at or near the entrance of the Workshop. He was not seen afterwards. No one knew where the Plaintiff had gone. It was not within the Plaintiff's usual duties to use the hoist to transport angle iron bars. Factotums would do such transporting work and were also responsible for clearing the Workshop floor of materials or debris. There was no shortage of factotums at

the Workshop. Matters considered The Plaintiff kept insisting that he was looking up, keeping his eyes on the machinery when transporting the angle iron bars. He said this was to see where the machinery was going. DW1 and DW2 gave evidence that the rails for the hoist were erected overhead of the passageways. The Plaintiff never suggested anything to the contrary. I think the Plaintiff's evidence even corroborated this aspect of Defence case - the Plaintiff said he was walking along a passageway near the load suspended from the hoist. The inference is that rails for the hoist must therefore be just above the passageway. The Plaintiff said that at one point he had to tread on metal sheets about 1.5 feet above ground. Be that as it might be, there was a passageway underneath the rails. In other words, where there was a passageway, the hoist could go. There was no need to adopt the unnatural act of looking up at the machinery as one walked along. I noted that even the Plaintiff admitted having to look ahead or at the load of angle iron bars - he said that he had to manoeuvre the load to left or right to avoid hitting the moulding-machine. I consider this insistence of the Plaintiff as nothing but an attempt to gild the lily, to impress upon the Court that he really had no chance to see what, if anything, was on the floor of the Workshop. In no uncertain terms, the Plaintiff explained that he was about 1 foot from the moulding-machine (or even closer) when he fell backwards and hit that machine. The Plaintiff said the machine was about 1 metre in height. I note the Plaintiff to be about 5 feet 5 inches tall. Given such measurements in height and the Plaintiff's proximity to the machine, I fail to see how the Plaintiff's (right) scapula could have come into contact with the machine. DW2's evidence was that the hoist moved forward at a very slow speed. It was slower than a person's normal pace. In order to operate the control-panel of the hoist, the Plaintiff was bound to proceed at about the same slow speed. Given such circumstances, I find it improbable that the Plaintiff would slip and fall backwards even if he had stepped on a metal rod. The Plaintiff was in pain. He was hurt to the extent that he could no longer move his right arm. One would have thought it natural to immediately call out for help from colleagues nearby. Instead, the Plaintiff used his left hand to make a call over his mobile telephone (see also paragraph 9 above). He then left by himself, took a taxi to hospital and queued for hours waiting for medical attention. I consider such evidence ridiculous. I further consider that if Miss Lui or Michael had really been informed by the Plaintiff as he claimed, DW1 or DW2 would immediately have been told of the matter and they would have attended to the Plaintiff at once. The Plaintiff would not be left to his own designs. DW1 seemed to agree that there was such a post as cleaner at the Defendant

- s. DW1 was not able to recall whether a cleaner had left the Defendant about one month prior to the material day or if a replacement had been employed. DW2 said there was no such particular post. Workers employed as factotums would do whatever cleaning or clearing work that was required. DW2 also denied there had been any shortage in the number of workers or factotums. I consider the discrepancy here between DW1 and DW2 as more apparent than real. I consider cleaner or factotum as no more than mere labels. It is just a case of a rose by any name. I accept there was no decrease in the number of workers to clean or clear up the Workshop. DW2 was a bit brusque with Counsel for the Plaintiff. I did

not like this his behaviour. I regret to say that I was dilatory in telling him to conduct himself properly. I find, however, that both he and DW1 were trying their best to truthfully tell what they knew about the case. As already indicated, I accept their evidence. The burden is on the Plaintiff to prove his case. I simply do not believe his evidence as to what happened to him that morning. His claim must fail. Despite the above conclusion, I wish to deal further with two other matters the medical evidence available in this case and the issue of contributory negligence. I start by looking at the medical evidence. It is beyond dispute that the Plaintiff did not suffer any bone fracture. There was no muscle wasting save for mild wasting of the right deltoid (see, for example, Trial Bundle page C004). There is, however, nothing to show that this mild wasting has any significance or bearing on the present case. At one time, there was some uncertainty as to whether the Plaintiff suffered injury to the rotator cuff of the right shoulder. Magnetic Resonance Imaging () examination was done on 13 January 2005. The only finding of note is Degenerative changes were noted at acromioclavicular joint. Mild inferior indentation on anterior supraspinatus tendon is suggested. The opinion was Mild impingement of supraspinatus tendon by acromioclavicular joint hypertrophic changes of undetermined relevance. One is entitled to say that this is all Greek. Fortunately, both Dr. Au Ka Kau (Dr. Au) and Dr. Tsoi Chi Wah (Dr. Tsoi) explained that the MRI examination revealed nothing of relevance to the present case (see respectively Trial Bundle C034-035 and C048-49). There is nothing to show injury to the right rotator cuff. I should immediately identify Dr. Au and Dr. Tsoi. They were (and still are) medical practitioners. They were asked respectively by solicitors for the Plaintiff and solicitors for the Defendant to examine the Plaintiff. Dr. Au examined the Plaintiff on 21 February 2005 and Dr. Tsoi conducted his examination on 12 June 2006. Each doctor wrote 2 medical reports. The second reports were necessary because the MRI examination report was not previously made available to them. Dr. Au s first medical report dated 26 February 2005 can be found at Trial Bundle page C008. The Plaintiff s complaints to Dr. Au were:

- (i) Right scapular region pain especially at night, and from noon to 2:00 p.m., it is weather related. Rotation of the forearm caused right elbow pain. There was no elbow pain at rest. Weakness of right upper limb. Dizziness which started seven to eight months ago. Chest wall pain caused by deep breathing, which started seven to eight months ago. The Plaintiff said that his right shoulder pain was more severe than right elbow pain. After examining the Plaintiff, Dr. Au found:
 - 1. There was tenderness over the medial border of right scapula and lateral aspect of his right elbow. there was no muscle wasting of the upper limbs. The right shoulder movement was limited. The right elbow flexion was mildly restricted. The motor power the right upper limbs was limited by right elbow and scapular pain. Dr. Au concluded that: 8.2.1. Mr. Yip sustained right shoulder and right elbow injury during work on 26th March 2004. 8.2.2. Mr. Yip s right elbow pain is compatible with the injury he sustained during the captioned accident. 8.2.3. Mr. Yip s right shoulder pain and stiffness probably are results of the captioned accident. Dr. Au went on to assess permanent impairment of the Plaintiff. After reading the MRI examination report and the 2 medical reports of Dr. Tsoi, Dr. Au wrote his

second report of 18 January 2007 (Trial Bundle page C034) in which he stated that

4. Summing up Mr. Yip's case, I opine his right shoulder pain and impaired movement is (sic) likely due to adhesive capsulitis of his right shoulder, which is a complication of the injury sustained by Mr. Yip during the captioned accident. I detected no evidence of symptom exaggeration during my evaluation. After perusal of the additional document, I maintain my opinion stated in my report dated 26th February 2005. I understand the additional document to mean the MRI examination report and the 2 medical reports of Dr. Tsoi. Dr. Tsoi's first medical report can be found at Trial Bundle page C036. The problems complained of by the Plaintiff were:
 1. There is weakness of whole right upper limb. The right shoulder is painful during rainy days. This will disturb his sleep. He suffers from headache and dizziness after the injury. Deep breathing will trigger chest wall pain. Examination of the right shoulder showed, inter alia: 3.1 No wasting of shoulder girdle muscle. 3.2 Tenderness over biceps tendon (short head). 3.3 Tenderness over medial border of right scapula. 3.4 No soft tissue swelling Examination of the right elbow showed, inter alia: 4.1 Normal shape. No swelling. Absence of muscle wasting over arm and forearm 4.7 Normal strength to all directions Dr. Tsoi found the right elbow to have recovered completely and considered that it incurred no permanent impairment. Dr. Tsoi was of the view that the Plaintiff raised several inappropriate complaints such as (sic) headache, dizziness, chest discomfort on inspiration. These cannot be explained by the physical injuries he sustained and probably are unrelated to the accident (see Trial Bundle page C044-C045). On the assumption that the Plaintiff had suffered some injury to the rotator cuff, Dr. Tsoi went on to assess impairment. I think Dr. Tsoi had difficulty finding a reason for the Plaintiff's complaints of discomfort. Injury to the right rotator cuff seemed the only plausible explanation. The MRI examination report was subsequently made available to Dr. Tsoi. The report showed nothing significant or relevant. Injury to rotator cuff was ruled out. In his second report of 12 September 2006 (Trial Bundle page C048-049), Dr. Tsoi wrote:
 4. Having considered the MRI finding, I am of the opinion that Mr. Yip was exaggerating his disability during the assessment. The AC joint hypertrophy and probably supraspinatus impingement were related to natural degeneration. The subject accident, if occurred, did not cause any permanent structural damage
 6. Permanent impairment incurred by the subject accident should not be more than 1%. The subject accident did not incur any loss of earning capacity. As indicated earlier, the Plaintiff suffered no bone fracture. There was no muscle-wasting (save for mild wasting of the right deltoid. See paragraph 20 above). There was nothing to indicate injury to tendons or nerves. One can be forgiven for asking just what was causing the Plaintiff the pain and discomfort he complained of. It is clear that Dr. Au came to his view or conclusion based on the complaints or responses of the Plaintiff during examination. I consider this a rather weak basis for concluding that the Plaintiff was injured. Just because the Plaintiff says there is pain or that he cannot move his arm in a certain way does not necessarily mean such to be a

fact. This is particularly so in this case where there is no indication of anything wrong with his bones, muscles, tendons or nerves. I consider it was the absence of any such indication that ultimately led Dr. Tsoi to draw the conclusion he did i.e. the Plaintiff was exaggerating his pain and disability. I prefer and accept the evidence and conclusion of Dr. Tsoi. This is added reason for my disbelieving the Plaintiff and ordering dismissal of his claim. Counsel for the Plaintiff criticised Dr. Tsoi's second medical report by submitting that there was contradiction between paragraphs 4 and 6 of the report (see paragraph 30 above). I understood Counsel to mean that paragraph 4 mentioned there had been no permanent structural damage whereas paragraph 6 suggested there was permanent impairment but that it should be not more than 1%. The words permanent structural damage must be read in the context they were used in paragraph 4 of the report. It is clear that Dr. Tsoi was merely referring to permanent damage to the skeleton. There is no contradiction - absence of permanent damage to the skeleton does not mean that there can be no permanent impairment to the person. I think Dr. Tsoi was saying in paragraph 6 no more than that even if the Plaintiff had been injured in an accident, the injuries could not have been serious. Permanent impairment, if any, should not be more than 1%.

33. The exercise of assessing quantum of damages depends to a very large extent on the evidence of the Plaintiff and the relevant medical evidence. I have found the Plaintiff disingenuous and not worthy of belief. I have also come to a conclusion on the medical evidence adverse to the Plaintiff's claim. I see no point proceeding to assess damages and will not do so. The Plaintiff is an adult with a number of years of working experience. He has worked at the Defendant's Workshop for some 3 months. He knew, according to his case, that the Workshop floor was littered with metal rods or other debris. I consider the Plaintiff himself negligent in walking whilst looking up at the machinery as opposed to looking carefully at the floor. If the Defendant were liable, I would have held the Plaintiff 50 % contributory negligent. Abu B. bin Wahab Deputy FORMTEXT District Court Judge Representation: Miss Catherine K.K.Wong instructed by Messrs. K. Y. Woo & Co. for the Plaintiff Mr. Carl Yuen instructed by Messrs. Day & Chan for the Defendant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V & `#\$ g"" @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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