PANG PING SUM v ENPACK (HONG KONG) LTD & OTHERS

20 October 2005

Court of First Instance

CFI

Personal Injuries Action No. 290 of 2003

HCPI 290/2003

Citations:	[2005] HKEC 1657
Judge name:	Suffiad J
Phrases:	Tort and personal injury - Tort - employer's liability - liability to employees - duty to provide safe system of work - workman injured by cement spraying machine which suddenly recoiled - whether employer in breach of duty - whether employer, principal contractor and sub - contractor liable - whether workman contributorily negligent Damages (personal injuries or death) - head - laceration - fractured cervical vertebra - wrist - post - concussional syndrome - depression - persistent headache, neck pain and right wrist pain
Counsel In The Case:	Mr Paul Lam, instructed by Messrs William K W Leung & Co., for the Plaintiff Mr Patrick Lim, instructed by Messrs Krishnan & Tsang, for the 1st and 3rd Defendants Mr Roland Lau, instructed by Messrs Ng & Shum, for the 2nd and 4th Defendants

Details of Judgment:

1. The plaintiff claims damages for personal injuries sustained by him in the course of his work on 21.February 2002 at a construction site at a slope behind the Ngau Tau Kok Government Offices ("the Site").

The accident

2. On the day in question, the plaintiff was instructed to spray cement on the slope at the Site using a cement spraying machine which was part of a project for slope reinforcement and stabilisation. He was assisted by another worker and the two of them together carried out the cement spraying work by use of a hose. The plaintiff was called the 1st.hose and his colleague the 2nd.hose. Together, they held a hose from the cement machine to spray cement on the slope.

3. Another three workers operated the cement spraying machine in that they controlled the switching on and off the spraying machine as well as shovelling dry mortar powder into the machine which, by use of a compression pump, would be pumped into the hose and carried along the hose to the nozzle of the hose and then sprayed onto the slope. At the time the dry mortar powder is sprayed out from the nozzle of the hose (held by the plaintiff and his assistant), the dry mortar powder would be mixed

with water (carried along a different hose) such that the mortar powder would then be mixed with the water from the other hose and be sprayed onto the slope in a wet condition thus becoming wet cement when sprayed.

4. At some time in the afternoon of the day, there was some blockage to the hose of the cement spraying machine as a result little or no cement was spraying out from the hose. Due to the blockage, the plaintiff's colleague went down the slope to check to see what was causing the blockage and to inform the operators of the machine to switch it off. The plaintiff was left alone on the slope holding the hose.

5. It is the plaintiff's case that suddenly without warning, and possibly due to the pressure building up in the cement spraying machine, the hose which was held by the plaintiff alone, suddenly and violently spurted out cement and recoiled, knocked against the plaintiff and caused him to fall and hit against some objects, exactly what the plaintiff does not know.

6. The plaintiff was knocked unconscious for a short while and when he came to he was bleeding profusely. He descended down the slope himself. When his colleague saw the plaintiff and that he was injured and bleeding, they assisted him and made a 999.report to the police.

7. Later the plaintiff was taken by ambulance to the United Christian Hospital ("UCH") where he was diagnosed to have suffered amongst other things, a fracture to his skull and a fracture to his wrist. (His injuries would be dealt with in detail when I.come to deal with quantum.) For present purposes, it is sufficient to only mention the more severe of his injuries and the fact that the plaintiff lost consciousness for some short period of time after being hit by the recoiling hose to explain the later events which is in issue between the parties.

The plaintiff's claim against the defendants

8. The 1st.defendant is sued as the principal contractor of the Site.

9. It is the plaintiff's evidence that he was employed at the material time by the 2nd.defendant. Although the plaintiff was not aware of the existence of the 4th.defendant at the time of the accident, it appears from documents produced in evidence that those documents suggest that the 4th.defendant, being a limited company with a name similar to the 2nd.defendant, that the 4th.defendant may be the employer of the plaintiff. No doubt it was due to such documents that the 4th.defendant was made a party to this matter, as being the employer of the plaintiff in the alternative.

10. The 3rd.defendant is the sub-contractor of the 1st.defendant at the Site.

11. The 1st.and 3rd.defendants are represented by the same firm of solicitors while the 2nd.and 4th.defendants by another firm of solicitors.

12. There are cross allegations between the 1st.and 3rd.defendants on the one hand and the 2nd.and 4th.defendants on the other hand as to who was in fact the employer of the plaintiff at the time of the accident. That is one of the issues in this matter which needs to be resolved.

The employer of the plaintiff

13. It is the plaintiff's evidence that on the evening of 20.February, the night before his accident, he was contacted by phone by the 2nd.defendant and was asked by the 2nd.defendant to attend for work at the Site the following morning.

14. The plaintiff had previous to this occasion worked for the 2nd.defendant doing the same type of cement spraying work.

15. When he was contacted by the 2nd.defendant on the evening of 20.February, and without any other indication by the 2nd.defendant, the plaintiff came to the usual understanding that he was being employed by the 2nd.defendant to do spraying work. It was only after he was discharged from hospital and when he was chasing the 2nd.defendant for sick leave payment that the 2nd.defendant denied to be his employer in this matter and told him that he was in fact employed by the 3rd.defendant.

16. It is the evidence of the 3rd.defendant that the 1st.defendant was the principal contractor at the Site. The 1st.defendant sub-contracted the entire project at the Site to the 3rd.defendant. In turn the 3rd.defendant sub-contracted the cement spraying part of the works to Ng Kwan who is the sole proprietor of the 2nd.defendant and a shareholder and director of the 4th.defendant. In respect of this sub-contract to Ng.Kwan, it was agreed between Kwong.Chi.Choi of the 3rd.defendant and Ng.Kwan that the payment for the sub-contracted cement spraying work will be calculated on a daily rate of.

$10,000 and that $20,000.cash was paid as an interim payment through its foreman Fong to Ng.Kwan at the start of the sub-contracted works. It was also agreed that Ng.Kwan will supply the labour and the machinery for the cement spraying works but the 3rd.defendant will provide the mortar powder material.

17. However, it is the evidence of Ng.Kwan that he engaged the plaintiff to work on the Site not as his employee, but as the employee of the 3rd.defendant. This was done by him solely as a favour to Kwong.Chi.Choi at Kwong's request. Moreover, he also lent the machinery for the cement spraying works to the 3rd.defendant which he had caused to be transported into the Site on the morning of the accident to the plaintiff and that he had also given a lift to two of the four workers engaged by him on behalf of the 3rd.defendant into the Site the same morning.

18. It is the evidence of Ng.Kwan that there was no sub-contract between him and the 3rd.defendant for the cement spraying work on the Site on 21.February 2002.

19. As for the.$20,000, Ng.Kwan does not deny receiving $20,000.from the 3rd.defendant through its foreman, but says that it was payment previously owed to him by one Waylink Engineering Ltd, one of whose director was Kwong.Chi.Choi, and this amount owed to him was promised by Kwong.Chi.Choi as a condition to his lending his machinery and assisting the 3rd.defendant to engage cement spraying workers on this occasion.

20. On this issue, the plaintiff and the 3rd.defendant also relies on a handwritten certificate written in Chinese and signed by Ng.Kwan on behalf of the 4th.defendant which was dated 16.April 2002 and faxed to the 3rd.defendant seemingly on 17.April. (I.say seemingly because it was the evidence of all concerned with the making of that document that it was faxed to the 3rd.defendant on the same day that it was made. However, no significance turns on the date either of its coming into existence of its being faxed to the 3rd.defendant.)

21. The English translation of that certificate reads as follows.:

"This is to certify that Pang.Ping.Sum I.D..H093943(0), on 21st.February 2002 being the first day working for Ng Kwan Kee Engineering Company Limited, met an accident on the same day causing injury during work. Now this company requests Nam Fung Engineering Company Limited instead to pay the wages to Pang.Ping.Sum.

[Chop of Ng Kwan Kee Engineering Co. Ltd.] (signed) Ng.Kwan

16-4-2002"

22. In respect of this certificate, the plaintiff gave evidence that after his discharge from hospital, he chased Ng.Kwan for the wages owed to him in respect of the work at the Site, but Ng.Kwan told him that he (Ng.Kwan) did not have money to pay him and gave him the phone number of Kwong.Chi.Choi of the 3rd.defendant. When the plaintiff called Kwong, Kwong denied knowing who the plaintiff was and so the plaintiff reverted back to Ng.Kwan. As a result the plaintiff and his wife met with Ng.Kwan and a friend of Ng.Kwan known only to the plaintiff as Ah.B when that certificate was written by Ah.B (on behalf of Ng.Kwan) and then signed and chopped by Ng for the purpose of enabling the plaintiff to chase for his wages from the 3rd.defendant. The certificate was then faxed over to the 3rd.defendant by Ah.B on the same day at a construction site in Lam Tin near the fire station.

23. Ng.Kwan's evidence on the other hand was that the plaintiff was in deep financial difficulties and pleaded with him to assist the plaintiff in getting back his wages from the 3rd.defendant. According to Ng.Kwan, the wording put on the certificate came from the plaintiff and his wife and was written out by Wong.Chun.Sing ("Wong"). Although it was incorrectly stated in the certificate that the plaintiff was working for the 4th.defendant, Ng.Kwan was agreeable to signing it in order to help the plaintiff and, at that time, had no idea that the certificate would be used by the plaintiff to sue him or the 4th.defendant as being the plaintiff's employer.

24. Wong also gave evidence, being a witness called by the 2nd.and 4th.defendant. His evidence was similar to that of Ng.Kwan in so far as the purpose of the certificate was concerned. However, when asked who it was who suggested the wording of the certificate, he was rather vague about it saying that all the four persons present had suggested what was ultimately put down on the certificate.

25. On the issue of the employer, Ng.Kwan also called another witness, Li being one of the shoveller who worked at the Site in respect of the cement spraying work on the day of the accident and who was one of the four workers whom Ng.Kwan had told to go to the Site that day. His evidence was that

he had all along been told by Ng.Kwan when he was first engaged that the 3rd.defendant was to be the employer for the cement spraying works at the Site.

Factual dispute on the plaintiff's case on liability

26. Apart from the plaintiff there was no other eye-witness to the occurrence of this accident. In the circumstances, it was little surprise that no direct evidence could be adduced by any of the defendant to challenge or contradict the plaintiff's evidence as to how this accident occurred.

27. However, there are nevertheless some subsidiary factual matters in dispute between the parties on the issue of liability.

28. Firstly, notwithstanding that no direct evidence had been adduced by the defendants relating to the occurrence of this accident, the 1st.and 3rd.defendants nevertheless still dispute whether the accident did occur in the way described by the plaintiff.

29. In so doing, the 1st.and 3rd.defendants base their challenge to the plaintiff's evidence on two matters. Firstly, they point to the medical report prepared by the doctor at the Accident and Emergency Department ("A and E Dept") of the United Christian Hospital in which it was stated that the plaintiff claimed to have sustained his injuries having fallen down while working. Secondly, they point to the first two statements given by the plaintiff, one to the main contractor and the other to the Labour Department, in which the plaintiff said he was unable to say or remember how the accident happened. Both statements were taken shortly after the accident when the plaintiff was still recovering in hospital.

30. The 1st.and 3rd.defendants rely on both those matters combined to suggest that the accident was not due to the recoil of the hose and that the accident did not happen in the way the plaintiff now says it did.

31. Two further factual matters are in dispute relating to the issue of liability.

32. Firstly, the plaintiff says that on the morning of the day of the accident, when he started work, he had asked the foreman at the Site to provide him with a walkie talkie so that he could properly communicate with those workers operating the cement spraying machine. Despite such request, the foreman did not supply him with such walkie talkie. In this respect it is also the plaintiff's evidence that where he was working on the slope spraying the cement that morning and that afternoon, he could not be seen by the workers operating the machine. He was at a distance of some 200.metres from where the operators of the machine were situated. Therefore it made it difficult if not impossible for him to properly communicate with the operators when he needed to tell them to stop or start the machine. Because there was no proper communication system between them, either he or the 2nd.hose had to walk quite a distance before he could yell to the operators of the machine to either start or stop the machine.

33. This evidence of the plaintiff is disputed by Fong.Sze.Wai the foreman of the 3rd.defendant whose evidence was that at no time had the plaintiff asked him for a walkie talkie. In any event a walkie talkie was not needed for the plaintiff to communicate with the machine operator at this Site because the plaintiff was able to communicate with the operator either by hand signal or by yelling to the operator.

34. In cross-examination, the foreman said that at the time just before the accident, the operator could not see the plaintiff from where he was but could see the 2nd.hose with some difficulty because the corner of the Government Offices was obstructing his view.

35. The second matter in dispute was that it was the plaintiff's evidence in the case that dry mortar powder can remain in a good and dry condition for between 2.to.4.hours for use. However the mortar powder used on that day was delivered to the Site in the morning and laid out on the ground on sheets of nylon when work stated that day. After the lunch break, he had informed the foreman at the Site that the mortar powder had become somewhat condensed and was beginning to solidify and requested that some fresh mortar powder be used. Again such request of his was ignored by the foreman. In the circumstances, it was likely the condition of the mortar powder used could well have contributed to the blockage in the hose leading to this accident.

36. This evidence of the plaintiff was also disputed by the foreman of the 3rd.defendant who said that the plaintiff had not requested for fresh mortar powder to be used after the lunch break and in any event the mortar powder which was delivered in the morning had all been used up by the lunch break that day and that the mortar powder used after lunch was freshly delivered to the Site after the lunch break.

Finding of fact

37. On the issue of the employer of the plaintiff, I.have no hesitation in accepting the evidence of the plaintiff and the evidence adduced by the 3rd.defendant that Ng.Kwan (or his company, the 4th.defendant) was the sub-contractor of the cement spraying works at the Site and that it was Ng.Kwan or the 4th.defendant who had employed the plaintiff to work there.

38. There is overwhelming evidence in the case all pointing to the fact that Ng or the 4th.defendant was the sub-contractor in the cement spraying works. It was Ng who contacted the plaintiff and other workers to attend the Site for the cement spraying works. At the time the plaintiff was engaged by Ng, the plaintiff was not told that he would be working for some other person, let along the 3rd.defendant. On the morning of 21.February, Ng had transported not only the cement spraying machines into the Site but had also transported two of the workers to the Site. Ng had approached the foreman at the Site to say that he was short handed and as a result, the 3rd.defendant loaned one of the workers on the Site to Ng on the basis that the wage for that day of that worker (being.$500) would be deducted from the sub-contract fee for the day. The sub-contract fee agreed between the 3rd.defendant and Ng being $10,000.per day and Ng was paid an advance of $20,000.at the start of the work.

39. I.accept the explanation given by the 3rd.defendant's witness that there was no written contract or quotation for this sub-contract agreed with Ng.Kwan for the cement spraying works because it was a relatively small sub-contract which would take only several days to complete. Therefore the sub-contract fee agreed with Ng.Kwan was agreed on a daily basis of $10,000.per day the reason being that there was an arrangement with the Ngau Tau Kok Government Office that works at the Site had to stop at certain times of the day when there would be cars coming in or parking there at the Site since the Government Office was still in operation while such works were being carried out by the contractors.

40. I.find also that the certificate dated the 16.April 2002 was signed and chopped by Ng on behalf of the 4th.defendant with the full knowledge of its contents and that in so far as it stated that the plaintiff was working for the 4th.defendant at the site at the material time, that was a correct reflection of the situation when the accident occurred.

41. In coming to such a finding, I.have rejected the evidence of Ng.Kwan and Wong relating to the certificate. Wong was unable to give any satisfactory explanation as to why, if his understanding at the time of writing the certificate was that it was to be used by the plaintiff to chase for payment of wages from either the main contractor or from the 3rd.defendant as a sub-contractor but that the 4th.defendant was not the employer of the plaintiff, that certificate could not have been worded to reflect the true situation (as understood by him) to say that the plaintiff was engaged in the work by Ng.Kwan (or the 4th.defendant) on behalf of the 3rd.defendant instead of stating therein that the plaintiff was working for the 4th.defendant.

42. In any event, if the 4th.defendant or Ng.Kwan was not in any way involved with the cement spraying work at the Site at the material time, it had no status to certify anything relating to those works and that certificate would have been worthless anyway. That certificate could only have come about in the circumstances of this case if the 4th.defendant was the sub-contractor of the 3rd.defendant.

43. I.therefore find that the 4th.defendant was the employer of the plaintiff in this case.

44. I.make this finding against the 4th.defendant (as opposed to the 2nd.defendant) because it was conceded by the plaintiff as well as by the 3rd.defendant that if such a finding was made against the 2nd.or 4th.defendant, the documentary evidence together with all the other evidence in this case points quite clearly to the fact that it should be the 4th.defendant rather than the 2nd.defendant who should be the sub-contractor for the cement spraying works and therefore the employer of the plaintiff. Such concession was, in my view, on the totality of the evidence, correctly made and indeed that is the position adopted by the 2nd.and 4th.defendants as well.

45. Turning now to deal with the factual disputes relating to liability, I.found the plaintiff to be a thoroughly honest witness. He was a person of very low education and therefore quite inarticulate in expressing himself. Moreover, in many of his answers, he gave the distinct impression that he was in no way trying to manipulate his answers to suit his case but rather was doing his best to tell the court what happened as best as he could remember.

46. That he was not well served by his memory (which may well be due to his injuries suffered in this accident) can readily be seen by his evidence that the certificate signed by Ng.Kwan and dated

16.April 2002 was written in the construction site at Lam Tin when it was the evidence of Ng.Kwan and Wong that the certificate was written and signed when they were having tea in a restaurant in Aberdeen that morning but was later taken to the construction site in Lam Tin where it was faxed to the 3rd.defendant.

47. I.accept that when giving that evidence the plaintiff did not correctly remember where it was that the certificate was signed but nothing turns on the incorrect evidence given by him in this respect save only to highlight that his memory was at fault.

48. As for the occurrence of the accident and how it occurred, I.have no hesitation accepting the evidence of the plaintiff.

49. I.do not see that even if there was any inconsistency between his evidence and the words written by the doctor in the medical report from the A.and E.Department of UCH, such inconsistency can cause me to disbelieve the plaintiff's version. After all, the doctor was concerned with the plaintiff's injuries and not with how the accident occurred. The doctor was not called by the defendants and for all I.know, the words written by the doctor as to how he understood the accident to have occurred may well have been an incomplete record of what he was told since the doctor was under no duty to record down fully and completely what he was told about the occurrence of the accident itself.

50. As for the first two statements made by the plaintiff (one to the safety officer of the 1st.defendant and the other to the Labour Department), they were made when the plaintiff was still in hospital. In the light of his injuries especially the injury to his head (which had resulted in some amnesia) it is hardly surprising that at such an early time after the accident when he was asked to give a statement, he would be in difficulty remembering what had happened.

51. Those statements cannot be viewed in the same light as statements from a normal and healthy person without any head injury and not suffering from amnesia.

52. In all the circumstances of this case, I.have no hesitation accepting the plaintiff's evidence despite what is contained in the medical report of the doctor from the A.and E.Department of UCH and the contents of his first two witness statements relied upon by the 1st.and 3rd.defendants.

53. As for the plaintiff's request for a walkie talkie from the foreman at the Site and his request to the foreman to use fresh mortar powder after lunch, on both of these issues, I.also accept the plaintiff's evidence.

54. I reject the evidence of the 3rd.defendant's foreman on both these issues for the following reasons.

55. On the issue of the walkie talkie, the evidence of the foreman is that there was no need for walkie talkie to be employed on this Site for the cement spraying works because the plaintiff and/or the 2nd.hose could easily yell to the machine operator or communicate to them by hand signals to stop the machine.

56. Indeed the foreman went as far as to say under cross-examination that immediately before the accident occurred to the plaintiff, the machine had been stopped as a result of either the plaintiff or the 2nd.hose yelling to the machine operator to stop the machine (after the blockage had occurred). He further said that the reason the 2nd.hose came down the slope to where the machine operator was situated was to find out the reason for the blockage.

57. Not only was this evidence of his given in cross-examination not contained in his witness statement (which was adopted as his evidence-in-chief), when that issue was always in dispute and had been pleaded by the plaintiff. That evidence of the foreman was wholly contradicted by another defence witness called by the 2nd.and 4th.defendants, namely Li.Choi.Kam (one of the shovellers operating the machine), who said that the operator did not switch off the machine up to the time when the 2nd.hose came down to the machine from the slope where the cement was being sprayed.

58. On this issue, I.find the evidence of the foreman to be wholly unbelievable and I.prefer and accept the evidence given by the plaintiff.

59. On the issue of the fresh mortar powder, once again, the evidence of the foreman that fresh mortar powder was delivered to the Site during the lunchtime and used in the afternoon was never stated in his witness statement although that issue had all along been in dispute between the parties and was pleaded in the Particulars of Negligence in the Statement of Claim.

60. Once again I.reject the evidence of the foreman preferring and accepting the evidence of the

plaintiff on this issue.

Liability

61. Dealing first with the 4th.defendant who I.have found to be the employer of the plaintiff in respect of the cement spraying works on the Site, it is under a non-delegable duty to provide the plaintiff with a safe system of work.

62. From the evidence before me, namely, that the spraying of the cement involves high compression force or pressure forcing the mortar powder through and along the hose to be sprayed, and the fact that there normally needs to be two persons (the 1st.hose and 2nd.hose) to safely hold the hose when spraying, I.can infer that because of the high pressure necessary to operate the hose for the spraying, the hose, when in use, is a potentially dangerous piece of machinery to the person holding it since the high pressure can cause the hose to recoil and therefore to swing or sway.

63. In those circumstances, it is important that the system of works operate in such a way that there can be adequate, direct and timely communications between those actually holding the hose and those operating the machine and controlling the on/off switch of the machine, all the more so when they are some distance apart.

64. In the present case, on the facts as I.have found them, there was not such a proper or sufficient means of communication made available to the plaintiff such that there could be timely communication between him and the operators of the machine. Such communication as there was, was left haphazardly to hand signals and shouting between them. Such communication could only have been very limited and was no doubt hampered by various forms of obstructions at the Site.

65. When blockage appeared and cement was not being sprayed out as smoothly as it should have been just moments before this accident, due to the lack of proper communication system, the plaintiff had to send the 2nd.hose down to where the operators were therefore leaving only himself to hold on to the potentially dangerous hose, thus increasing the risk to himself being without the assistance of the 2nd.hose to help him hold onto the hose in the event that the hose might recoil and swing with force.

66. In all the circumstances, there was no reasonably safe system of work provided to the plaintiff by his employer. The fact that the plaintiff had approached the foreman (being the foreman of the 3rd.defendant) at the Site to ask for better means of communication cannot assist the 4th.defendant to escape liability because his duty to the plaintiff is non-delegable. The 4th.defendant is the person to ensure that a reasonably safe system of work is in place.

67. I.therefore find the 4th.defendant to be liable to the plaintiff in this matter.

68. As for the 3rd.defendant, they will be vicariously liable for any negligence of their employee, being their servant or agent, in this case the foreman on the Site.

69. The foreman with his experience in such cement spraying works, must have realized the importance of adequate and proper communication between the hose operators and the machine operators, and yet, when asked for walkie talkie by the plaintiff, turned down such request from the plaintiff which is pure negligence on his part.

70. Moreover, from his own evidence the foreman also realized that mortar powder would start to condense within 2.to 4.hours after it was laid out for use.

71. On the facts as I.have found them, I.have accepted the plaintiff's evidence that the mortar powder which was used in the afternoon were those that were delivered and laid out in the morning of that day when the cement spraying works started. Therefore by 4.or 5.p.m. in the afternoon, that mortar powder had been laid out for use for much longer than 4.hours.

72. The evidence in this case, which was not disputed, was that the 3rd.defendant, being the one who had sub-contracted the cement spraying works to the 4th.defendant, was, as agreed by them in their oral sub-contract, the party to supply the mortar powder.

73. In all the circumstances of this case, it seems on balance, from all the evidence before me, that the blockage or partial blockage to the hose just before the accident to the plaintiff, was due to the length of time that the mortar powder had been laid out on the ground. In this respect I.accept the plaintiff's evidence that when he came back from lunch he had noticed the mortar powder which was laid out on the ground on a nylon sheet was starting to condense and solidify because of the moisture. That was when he asked for fresh mortar powder from the foreman but that request was

turned down.

74. The denial of the plaintiff's request for fresh mortar powder was, I.find, also a cause of the accident, albeit indirectly.

75. There can be no question but that it must have been foreseeable to the foreman of the 3rd.defendant that the use of mortar powder which was starting to condense and solidify would lead to possible blockage in the spraying operation which in turn might affect the smoothness of the pressure in the hose thus causing the hose to recoil and to swing.

76. The 3rd.defendant will also be liable to the plaintiff on this score as well.

77. Lastly, the 1st.defendant is the main contractor on Site. It was responsible for the general safety on the Site. Indeed, the evidence show that in that respect, it had a Safety Officer at the Site tasked with the duty to see to all aspects of safety on the Site.

78. On the finding made above, that the system of communicating between the hose operator and the machine operators was unsatisfactory and unsafe since it increase the potential risk and danger to the hose operator and such an unsafe system was being operated on the Site, the 1st.defendant as the main contractor of the Site will also be liable to the plaintiff for allowing or permitting such an unsafe system to be used on the Site in respect of the works carried out there.

Contributory negligence

79. Contributory negligence depends on some fault on the part of the plaintiff. The onus is on the defendants to show such fault.

80. From the evidence, the only possible basis for an allegation of contributory negligence in this matter comes from the defendants' allegation that the plaintiff had drunk beer during lunchtime.

81. In cross-examination, it was frankly admitted by the plaintiff that he did drink two cans of beer during lunch. However, there is no evidence before me as to the effect which the beer consumed by the plaintiff had on him, or that it had any part to play in causing this accident to the plaintiff.

82. The mere fact that the plaintiff drank beer at lunchtime is, on its own, insufficient for me to conclude that the plaintiff was himself at fault and guilty of any contributory negligence.

83. Accordingly, I.do not find any contributory negligence on the part of the plaintiff in this matter.

Quantum

84. I.now turn to deal with the issue of quantum.

Injuries and treatment

85. After the accident to the plaintiff, he had lost consciousness of a short period of some minutes. When he regained consciousness he managed to walk down the slope by himself. When he was seen by other workers on the Site coming down the slope and covered in blood, an ambulance was summoned and the plaintiff taken to the A.and.E Dept of UCH.

86. He was found to have a 4-cm laceration wound over the left occiput and tenderness over the right wrist, right lower chest wall and lower part of neck. X-ray showed fracture of right ulnar styloid. CT.scan showed a skull base fracture being a stable and non-displaced fracture of right lamina of the cervical 7th.vertebra.

87. He was then transferred to the Neurosurgical Unit as well as the Department of Orthopaedics and Traumatology of UCH for further management.

88. Long arm plaster and neck collar was applied for the fractures to the ulna and the cervical spine respectively and suturing of the scalp also carried out.

89. The plaintiff was discharged from the hospital on 26.February.2002 but was followed up at the Orthopaedics Department until June.2002.

90. In April.2002 the plaintiff returned to the A.and.E.Dept of UCH complaining of headache and was diagnosed to be suffering from post-concussional headache.

91. During 21.to 23.July 2002, he was admitted to the Medical Department of UCH upon further complaints of headache. On this occasion the diagnosis was compatible to adjustment disorder.

92. In August.2002 the plaintiff was referred to the East Kowloon Psychiatric Centre where he was

diagnosed to be suffering from depression.

93. In August.2002, he attended at the A.and E.Dept of UCH for some 6.occasions on different dates complaining of headaches each time. On the last occasion on 31.August, he was admitted to the Neurosurgical Unit for persistent post-concussional headache and was discharged the following day.

94. In September.2002, he again attended the A.and.E.Dept of UCH for some 3.times complaining of headache and shoulder pain.

95. He also attended the A.and.E.Dept of UCH on 3.different occasions each in October and November respectively making the same complaints of headache and shoulder pain.

96. Similar attendance was made once in February.2003 with the same complaint and also for a further 4.occasions in March.2003. Thereafter, one similar attendance in May.2004 and once each in September, October and November.2004.

97. The plaintiff also attended numerous follow-up treatments at different clinics and was given sick leave from the date of the accident continuously until 9.April 2003.

98. He was examined by orthopaedic experts instructed by both the plaintiff and the defendant, namely, Dr.Chan.Kow.Tak (plaintiff's expert) and Dr.Pang.Kin.Wai (defendants' expert).

99. Dr.Chan's report dated 1.September 2003 states that the plaintiff has persistent neck pain radiating to the right scapula, right frozen shoulder (due to the arm cast resulting from the injury) and deformed/painful right wrist. The neck pain is a consequence of the C7.lamina fracture which has healed. There is no neurological deficit of the upper limbs. The right wrist deformity and pain is minimal but results in a weaker right hand grip.

100. Dr.Pang's report dated 6.February 2004 states that the plaintiff still suffers headache due to post concussional syndrome, neck pain and right wrist pain as well as right frozen shoulder (likely due to immobilization of the right arm from the plaster cast).

101. There is little difference, if any, between the two orthopaedic experts.

102. The plaintiff was also examined by a neurologist, Dr.Edmund.Woo, whose report dated 24.September 2003 states that in the mental state examination conducted, the plaintiff demonstrated a mild impairment in tests of orientation and memory. He also has residual headache and impaired memory consistent with mild post-concussional syndrome.

Pain suffering and loss of amenities

103. Given the injuries and disabilities of the plaintiff as stated above, the plaintiff claims an award of $600,000.for pain suffering and loss of amenities. In so claiming, the plaintiff relies mainly on the award for PSLA given in the case of Lee.Kit.Ha v. KMB (HCPI.539 of 2000). The fallback position of the plaintiff is that the award under this head should not be less than $400,000.relying on the award for PSLA given in the case of Tam.King.Chiu v. Hon.Ming.Kuen (HCPI.1458 of 1999)

104. On the other hand, counsel for the 1st.and 3rd.defendants submits that the award for PSLA should not be more than $250,000.on the basis that the plaintiff's injuries and disabilities fall well below the "Serious Injury" category as it is understood in Lee.Ting.Lam v. Leung.Kam.Ming [1980]. HKLR.657.

105. Counsel for the 1st.and 3rd.defendants further relies on the awards for PSLA in the following cases for comparaison purposes.:

(a) Wong.Wing.Sun v. Chan.Man.Kin (HCPI.902 of 2002);

(b) Cheung.Hei.Kwong v. Kwong Key Cons.t & Eng. Ltd (HCPI.1260 of.1999); and

(c) Lau.Kin.Wai v. Chan Wai Sang & Anr (HCPI.1007 of.2000).

106. Whilst the cases cited for the award of PSLA are only useful as guidelines in laying down a range for PSLA awards, I.am of the view that the three cases cited by counsel for the 1st.and 3rd.defendants involve injuries and/or disabilities that are far less serious than what the present plaintiff has suffered.

107. On the other hand, the injuries and disabilities of the plaintiff in the case of Lee.Kit.Ha v. KMB are somewhat more serious than what the present plaintiff has.

108. Given all that has been said above in this judgment of the plaintiff's injuries and disabilities, I.am

of the view that $400,000.will be a reasonable sum to properly compensate the plaintiff for pain suffering and loss of amenities.

Loss of earnings (pre-trial)

109. In the final submission of all counsel concerned in this case, there is no dispute that the plaintiff's average pre-accident earnings was $13,300.per month.

110. It is also not in dispute that the plaintiff was granted sick leave for some 13 1/2.months from the day of the accident until 9.April 2003.

111. For the sick leave period therefore, the loss of earnings come to. $179,550.

112. After the sick leave period, it was submitted on behalf of the plaintiff that he may have been able to earn about $5,000.taking on alternative employment as a car park attendant or watchman and in such circumstances, his partial loss of earnings should be.$8,300.

113. On the other hand, the 1st.and 3rd.defendants submit that even if the injuries and disabilities of the plaintiff were to prevent him from returning to his pre-accident job as a hose operator (in which job he was well experienced), he should at least be able to work as a machine operator in the cement spraying works which would not be as strenuous as a hose operator. On that basis, and on the evidence of Ng.Kwan, a machine operator will receive a daily wage of $750.(as opposed to a daily wage of $1,000.for the hose operator), taking account of a.13.5.days work on average in a month, the plaintiff's partial loss of earnings after the sick leave period should only be $3,325.per month.

114. There is also evidence from Ng.Kwan on this aspect of the case which is that a machine operator will also, apart from switching on and off the machine, also have to help out by shovelling mortar powder into the machine.

115. Quite apart from the headaches suffered by the plaintiff, and with his resultant disability and pain to his wrist, he may have some considerable difficulty carrying out shovelling work as a machine operator.

116. From the medical evidence given in this case, it would appear that the plaintiff will only be fit for less exertive work by way of alternative employment. However, the $5,000.suggested by counsel for the plaintiff seems to be on the low side in so far as alternative employment is concerned. In the condition the plaintiff is in, he should be able to earn in the region of. $7,000.

117. Having said that, I.accept the plaintiff's evidence that after the sick leave period had expired, he had attempted to look for work but without success. No doubt one reason for that is that although he is an experienced hose operator when it comes to cement spraying, he has little experience working in other fields.

118. In those circumstances, it would not be unreasonable to allow a further 6.months after his sick leave expired for the plaintiff to seek and obtain alternative employment.

119. Accordingly, there will be a further six months of full loss of earnings which comes to.$81,000. Thereafter, for the remaining 24.5.months loss of pre-trial earnings will be only partial loss assessed at $6,500.per month of loss. This gives.$159,250.

120. The total pre-trial loss of earnings therefore comes to.$419,800.

121. The loss of related MPF is 5%.of that amount which is.$20,990

Future loss of earnings

122. For future loss of earnings, I.will adopt the above sum of $6,500.as being the multiplicand.

123. As for the multiplier, the plaintiff is now 44.years old. Had it not been for the accident, he would likely have continued working as a hose operator since he is well experienced in that line of work.

124. The plaintiff asks for a multiplier of.11.

125. Given the age of the plaintiff and that he is a manual worker at construction sites, in normal circumstances a multiplier of 10.would be appropriate. However, in this case, I.need to take into account that the work of a hose operator is extremely exertive and strenuous not to mention that it is also potentially dangerous. This can be seen by the fact that one person is usually considered insufficient to operate the hose and it is usual to engage two persons to do so at the same time.

126. There is also evidence before me from Ng.Kwan that normally a hose operator will, in his later

years, change to be a machine operator which is less strenuous and less exertive.

127. In those circumstances, I.take the view that this should be reflected in the multiplier to be adopted and in this case, I.am of the view that a multiplier of 9.would be appropriate to assess future loss of earnings.

128. The future loss of earnings therefore comes to.$6,500.x.12.x.9.giving. $702,000.

129. The related loss of MPF to the future loss of earnings comes to 5%.of the above figure which is.$35,100

Loss of earnings capacity

130. $60,000.is claimed under this head by the plaintiff. This amount and this claim is not disputed by the 1st.and 3rd.defendants.

131. The 2nd.and 4th.defendants submit that it should not exceed.$48,000.

132. In view of the disabilities of the plaintiff which will put him in a real disadvantage in the labour market even if he secures alternative employment, I.have no hesitation in awarding the amount claimed by the plaintiff under this head.

Special damages

133. Total special damages in the sum of.$9,180 are agreed by all the parties and will be allowed.

Interests

134. Interests on damages for PSLA will be awarded at 2%.p.a. from the date of the Writ (March.2003).

135. Interests on pre-trial loss of earnings and other special damages will be awarded at.4.617%.p.a. (being half judgment rate) from the date of the accident.

Summary of awards

136. PSLA $400,000

Pre trial loss of earnings and MPF 440,790

Future loss of earnings and MPF 737,100

Loss of Earnings Capacity 60,000

Agreed Special damages 9,180

Interests on PSLA 20,667

Interests on pre-trial loss and Specials 76,175

Total.: $1,743,912

In a case of this nature, where the claim is brought by a worker, it would be normal to be deducted from the assessed amount whatever sums had been received by the plaintiff by way of ECC compensation or any periodical payment such as sick leave pay.

137. However, in this case I.was informed by all counsel that although there were ECC proceedings started, those proceedings in the District Court has not progressed such that ECC compensation had been determined or any award made.

138. More disturbingly, I.was also informed by counsel for the 1st.and 3rd.defendants that no periodic payment for sick leave pay had been made to the plaintiff. That may be understandable in the case of the 3rd.and 4th.defendants where they both dispute being the employer of the plaintiff. But whoever was the actual employer of the plaintiff, one would have thought that the 1st.defendant, being the main contractor, should have made such sick leave payment to the plaintiff. There can be no good reason for it not to have done so, and indeed no reason was given by counsel as to why that was not done. That failure to make sick leave payment to this plaintiff must necessarily have caused him grave financial hardship during the pre-trial period.

Conclusion

139. There will accordingly be judgment for the plaintiff in the amount of $1,743,912.against the 1st,.3rd.and 4th.defendants.

140. The plaintiff's claim against the 2nd.defendant is dismissed.

Costs

141. There will be a costs order nisi that the 1st,.3rd.and 4th.defendants pay the plaintiff his costs of the action to be taxed if not agreed.

142. As for the costs of the 2nd.defendant, the general rule that costs should follow the event has to be departed from in this case due to the fact that the 2nd.defendant has misled not only the plaintiff but also the 3rd.defendant into believing that they were either being employed by him personally or were sub-contracting with him personally.

143. Indeed, even when giving evidence Ng.Kwan was not much concerned as to drawing a clear distinction between himself the person, his firm of which he is the sole proprietor or the 4th.defendant, the limited company, dealing with those matters the subject of this action. That can readily be seen from much of his paperwork where he uses the chops of his firm, the 2nd defendant, quite indiscriminately even when it was the 4th.defendant who was involved.

144. Ultimately, I.am satisfied that although the plaintiff failed in his claim against the 2nd.defendant, the proper order as to costs relating to the dismissal of the claim against the 2nd.defendant should be that the 2nd.defendant bears its own costs of these proceedings and that there be no order as to costs as between the plaintiff and the 2nd.defendant.

145. The plaintiff's own costs to be taxed in accordance with Legal Aid Regulations.