

O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N

LAU HO WAH

Appellant  
(Applicant)

and

YAU CHI BIU

Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment of the Court of Appeal of Hong Kong (Roberts, C.J., McMullin, V.-P., and Silke, J.A.) dated 21st December 1984 allowing an Appeal by the Respondent from the decision in the District Court of His Honour Judge Wong dated 24th July 1984.

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2. By their Order the Court of Appeal of Hong Kong set aside the award of \$91,238 for permanent partial loss of earning capacity made by His Honour Judge Wong to the Applicant under Section 9 of the Employees Compensation Ordinance Cap.282, and substituted a nil award in respect thereof.

p.49 1.18 to 24  
p.53 1.19 to 25  
p.32 1.21

3. The Applicant appeals to Her Majesty in Council against the said Order by leave of the Court of Appeal of Hong Kong dated 21st January 1985.

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4. The principal issue in this Appeal is whether the Court of Appeal of Hong Kong were right in concluding that no award could be made to an Applicant for permanent partial loss of earning capacity under Section 9(1)(b) of the said Ordinance in respect of injuries not specified in the First Schedule thereto if the Applicant at the date of the hearing of his application was not earning any less than at the time of his injury.
- p.25 1.23 to 29  
p.26 1.31 to 34  
p.31 1.36 to  
p.32 1.21  
p.38 1.8 to 15  
p.46 1.7 to 10  
p.48 1.28 to  
p.49 1.20  
p.53 1.1 to 18
5. The essential facts are as follows:
- (i) On 24th September 1982 the Applicant, then aged 27, was employed by the Respondent, the owner of a small transportation Company. His job was pushing a hand cart loaded with fruit and on occasions helping to load fruit on to lorries.
- p.82 to 83  
p. 2 to 3
- (ii) On the said date he suffered personal injury in the course of his employment when his head struck the ground.
- p.30 1.6 to 10
- (iii) As a result of the said accident the Applicant suffered permanent brain damage resulting in:
- (a) permanent weakness of his left arm and leg; p.14 1.14 to 17  
(b) impaired memory, reduction in concentration, increased irritability and other permanent mental disabilities; p.75 to 89  
p.92 to 94  
p. 8 to 14  
(c) future risk of epilepsy. p. 9 1.20  
p.14 1. 5 to 13
- (iv) After discharge from hospital the Applicant was out of work until April 1983 when notwithstanding his disabilities he obtained a job as a cleaner in the employ of Yan Chung Sun, by whom he was so employed at the date of the hearing in the District Court, at which date there was no present continuing loss of earnings because his earnings in the employ of Yan Chung Sun were as much as and more than in his pre-accident job.
- p.21 1.14 to 25  
p.22 1. 1 to 18  
p.30 1.14 to 18

6. At the hearing in the District Court:

- (1) Dr.Shroff gave evidence on behalf of the Applicant that he had suffered a permanent partial loss of earning capacity, which he assessed at 60% to 70%. p.9 1.25  
p.81
- (ii) Dr.Ng gave evidence on behalf of the Respondent that the Applicant suffered a permanent partial loss of earning capacity which he assessed at 50% to 60%, of which 30% related to the impairment of motor power of the left upper and lower limbs. p.14 1.14 to 23  
p.93
- (iii) His Honour Judge Wong found that there was a permanent partial loss of earning capacity of 60% and applying the formula laid down in the Ordinance made an award under Section 9 of the said sum of \$91,238. p.32 1.13
- (iv) His Honour Judge Wong additionally made awards under Section 10 of the said Ordinance in respect of sick leave pay and loss of earnings to July 1983 amounting to \$8,427 in respect of which there is no Appeal. p.30 1.20 to 32  
p.32 1.22

7. At the hearing of the Appeal the Court of Appeal of Hong Kong held that because the Applicant presently had a job earning as much as before the accident, he had suffered no permanent loss of earning capacity within the meaning of Section 9(1)(b) of the Ordinance and set aside the award thereunder. p.48 1.28 to  
p.49 1.20  
p.53 1.1 to 18

8. In February 1985 the Applicant lost his job and was out of work until late May 1985, when his employer, Yan Chung Sun, took him back on a part time basis because the Applicant was unable to obtain a job on the open market and Yan Chung Sun had sympathy for him. The Applicant now earns much less than at the time of the accident. Leave will be sought upon the hearing of this Appeal to adduce the further Affidavit evidence of Yan Chung Sun to this effect and to show that the Applicant's present reduction in earnings is attributable to his disabilities.

9. The Appellant respectfully submits that the Court of Appeal of Hong Kong:

- (i) Wrongly construed Section 9(1)(b) of the said Ordinance and Proviso (ii) thereto.
- (ii) Wrongly construed permanent partial loss of earning capacity as meaning something akin to present reduction in earnings. p.49 1.1 to 20  
p.53 1.10 to 14
- (iii) Wrongly construed permanent partial loss of earning capacity as relating only to the present and not to the future. p.49 1. 1 to 20  
p.53 1.10 to 14
- (iv) Wrongly construed permanent partial loss of earning capacity in such a manner as to require any Tribunal making an assessment thereof to ignore the fact that the Applicant would be at a disadvantage on the labour market in the event of his losing the job held by him at the date of the assessment. p.49 1. 6 to 20
- (v) Failed to have proper regard for the undisputed medical evidence of permanent partial loss of earning capacity of the Applicant. p.31 1.36 to  
p.32 1. 4
- (vi) Failing to have proper regard to the concluding words of Section 9(1)(b), namely "loss of earning capacity permanently caused by the injury in any employment which the Applicant was capable of undertaking at that time (date of injury)". The Court of Appeal of Hong Kong only had regard to the employment of the Applicant at the date of the hearing. p.49 1. 1 to 20  
p.53 1. 1 to 14
- (vii) Failed to have proper regard to the requirement in Proviso (ii) to Section 9(1)(b) of the said Ordinance that "In the case of injury not specified in the First Schedule the loss of earning capacity permanently caused ... shall, so far as possible,

be assessed in conformity with the scale of percentages specified in that Schedule". The Court of Appeal of Hong Kong made a nil assessment which was not in conformity with the said scale.

- (viii) Wrongly thought that the percentages in the First Schedule gave rise to compensation in respect of scheduled injuries akin to damages for personal injury irrespective of financial loss. p.48 1.36 to 43

10. The Appellant respectfully submits that the Appeal should be allowed and that the decision of His Honour Judge Wong in the District Court be restored for the following among other

R E A S O N S

- (1) BECAUSE the Court of Appeal of Hong Kong failed to apply the correct principles of law in their consideration of the instant case.
- (2) BECAUSE the Court of Appeal of Hong Kong failed to give due consideration to the findings of fact made by His Honour Judge Wong.
- (3) BECAUSE His Honour Judge Wong was entitled to make the findings of fact that he did.
- (4) BECAUSE the findings of fact of His Honour Judge Wong are correct on the evidence.
- (5) BECAUSE His Honour Judge Wong was right.
- (6) BECAUSE the Court of Appeal of Hong Kong were in error.

PATRICK BENNETT, Q.C.  
JONATHAN WOODS

No. 20 of 1985  
IN THE PRIVY COUNCIL

ON APPEAL FROM THE  
COURT OF APPEAL OF HONG KONG

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Between

LAU HO WAH Appellant

- and -

YAU CHI BIU Respondent

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CASE FOR THE APPELLANT

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