

IN THE PRIVY COUNCIL

No. 20 of 1985

ON APPEAL

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 RESPONDENT

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 the 21st day of December 1984 whereby that Court allowed an Appeal by the Respondent from the decision in the District Court of His Honour Judge Wong dated the 24th day of July 1984 whereby it had been adjudged that the Appellant should recover \$ 91,238 for permanent partial incapacity under Section 9 of the Employee's Compensation Ordinance Cap. 282. The Court of Appeal allowed the Respondent's Appeal and ordered that this award be set aside and substituted a nil award.

2. The Appellant appeals to Her Majesty in Council against the said Order by leave of the Court of Appeal of Hong Kong dated the 25th day of January 1985.

3. The principal issue in this Appeal is whether the Court of Appeal of Hong Kong were right in concluding that no award should be made under Section 9(1)(b) of the said Ordinance for permanent partial incapacity where the injury sustained was not specified in the First Schedule of the said Ordinance and where the Appellant's actual wage earning capacity at the time of the award was the same as or greater than his earnings at the time of the accident or whether any and if so what weight should be

given to the actual earnings of the Appellant at the time of the award when assessing the percentage proportion of permanent total incapacity.

RECORD

4. On the 24th day of September 1982 the Appellant, then aged 30, was injured in an accident sustained whilst he was employed by the Respondent in work involving pushing a hand cart loaded with fruit and occasionally helping to load fruit onto lorries. The Appellant fell from a lorry and struck his head on the ground suffering brain damage which caused mild weakness of the left arm and leg, increased irritability, impaired memory, reduction in concentration and a risk of future epilepsy.

5. The following evidence was adduced in the District Court

(a) Dr. Shroff stated that the Appellant had suffered a permanent partial loss of earning capacity which he put at between 60% and 70%. He attributed 30% of this to the weakness of the left limb and 30% to 40% to psychological effect.

p.9L1.24 & 1

p.9 L1.32-34

(b) Dr. Ng stated that the Appellant had suffered a permanent partial loss of earning capacity which he put at between 50% and 60%. He attributed 30% of this to the impairment of the Appellant's motor power of the upper and lower limbs and said this was permanent. He attributed 20% to 30% of this to high mental deficit which could improve by about 5% to 10% within 3 years of the accident.

p.14 L1.14-23

(c) Mr. Yan stated that he was employing the Appellant as a cleaner at a wage of \$2,000 per month and that he continued to employ him because he worked very hard under supervision.

p.21 L1.19-25

p.22 L1. 1-3

6. The District Judge held:

(a) That the Appellant earned an average of \$1,584 per month before the accident.

p.30 L1.14-18

(b) That the Appellant was able to earn a little more than he had earned before the accident

p.32 L1. 8-10

(c) That 60% disability was a fair and reasonable percentage to compensate the Appellant for the adverse effect of the accident on his mental and physical abilities. p.32 L1.10-4

7. The Court of Appeal of Hong Kong held that the Appellant had not proved permanent partial incapacity because at the date of the award he was able to earn more than he had earned before the accident. p.48 L.14 to p.49 L.5

8. The Respondent respectfully submits that the Court of Appeal of Hong Kong were right:

(a) Section 3 of the Ordinance defines "partial incapacity as"... such incapacity... as reduces his earning capacity in any employment which he was capable of undertaking at that time;" (that is the time of the accident). The Court of Appeal were correct to look at earning capacity and not at compensation for mental and physical disability.

(b) The First Schedule of the Ordinance specifies the percentage of the loss of earning capacity which must be applied for 40 easily identifiable types of personal injury.

(c) On a correct interpretation of Section 9(1)(b) and 9(1)(ii) of the Ordinance, where the injury is not so specified an investigation is necessary to fix a fair percentage. This should be done in the light of all the available evidence of the injured person's loss of earning capacity. Where evidence of an injured person's actual ability to earn is available it would be unreal to ignore it and assess his incapacity solely on medical evidence. And the Ordinance does not require this to be done.

9. It is respectfully submitted that if the Order of the Court of Appeal of Hong Kong in substituting a "nil" award under Section 9 of the said Ordinance is not correct, that Court's approach is correct in that the District Judge ought to have taken the Appellant's actual ability to earn into account, which he did not.

10. The Respondent respectfully submits that the Appeal should be dismissed with costs for the following(among other)

REASONS

- (1) BECAUSE the Court of Appeal in Hong Kong correctly applied the Employee's Compensation Ordinance Cap. 282.
- (2) BECAUSE the Court of Appeal of Hong Kong were entitled to apply principles of law to the findings of fact made by His Honour Judge Wong
- (3) BECAUSE the Court of Appeal of Hong Kong were right.

GRAEME HAMILTON Q.C
ANNA GUGGENHEIM

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Charles Russell & Co,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.

Ref: R/JA/HA 66-18.