Md Shohel Md Khobir Uddin
v
Chen Yongbiao and another

[2017] SGHC 109

High Court — Suit No 79 of 2016
Audrey Lim JC
24, 25 January; 3 March 2017

Tort — Negligence — Duty of care — Public Policy — Illegality of plaintiff negating duty of care

Tort — Negligence — Duty of care — Breach of duty

Tort — Negligence — Causation

Tort — Negligence — Contributory negligence

12 May 2017

Audrey Lim JC:

Introduction

1 The plaintiff ("Shohel") claimed damages for personal injuries suffered as a result of the negligence of the defendants, whilst performing work at a worksite on 21 September 2014 at the instructions of the first defendant, Chen Yongbiao ("Chen"), a director of the second defendant, Dongwu Steel Industry Pte Ltd ("Dongwu Steel"). The defendants denied that Shohel was employed by them on that day or that he was instructed to perform any work. I granted

interlocutory judgment for Shohel to the extent of 80% of the damages, with damages to be assessed. The defendants have appealed and I provide my detailed grounds of decision.

Plaintiff's case

2 Shohel, a Bangladesh citizen, was a foreign worker who was at the material time engaged by SPG Marine Pte Ltd ("SPG Marine") under a work permit. He lived in a dormitory and had a room-mate called Sujan, who was also employed by SPG Marine and whom he knew during the time they worked for SPG Marine.[1] On 20 September 2014, Sujan informed Shohel that he had previously done some work for Chen and asked Shohel whether he was interested to do the same. Sujan also informed Shohel that he would be paid $60 for a day's work, but did not give him any further details about the job.[2] Since the next day was his day off,[3] Shohel agreed.

3 In the morning of Sunday, 21 September 2014, Shohel followed Sujan to Joo Koon MRT station. There, Chen picked them up and drove them to a worksite at 30 Tuas Road ("the worksite"), at which Dongwu Steel operated. Upon arrival, Chen instructed them on their work, namely to shift some metal plates from inside the worksite to outside the worksite.[4] Shohel did not talk to Chen directly as his English was poor. However, he was informed by Sujan that

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1 Notes of Evidence ("NE") for 24 January 2017, p 34.

2 NE for 24 January 2017, p 9.

3 NE for 24 January 2017, p 9.

4 NE for 24 January 2017, p 13-14.

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he would be paid $60 per day (for eight hours) and overtime.[5] Whilst carrying a large metal plate with Sujan, Shohel stepped and fell into a "large hole".[6] Chen was not present when the accident happened. Shohel was then brought to Westpoint Hospital and was transferred to National University Hospital ("NUH") on the same day.

4 Contrary to Chen's testimony, Shohel stated that upon his arrival at the worksite, Chen did not ask Shohel or Sujan to sign any Visitor Application Form ("VA Form")[7] or to remain at the guardhouse to wait for their VA Forms to be processed. Shohel stated that whilst he was hospitalised at NUH, Chen gave him two forms to sign which appeared to be the VA Form and a form titled "Accident Statement"[8] (collectively, the "two forms"). Shohel simply signed the two forms as he did not understand them and did not know how to read English.[9] The two forms were not filled in when he signed them[10], and were never read or translated to him. For the Accident Statement in particular, contrary to Chen's allegations, Shohel stated that Chen did not ask him any questions before Chen filled it in.[11] These two forms will be discussed further below.

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5 NE for 24 January 2017, p 10.

6 Shohel's affidavit of evidence-in-chief, paragraph 15.

7 Plaintiff's Bundle of Documents ("PB"), p 32.

8 PB, p 31.

9 NE for 24 January 2017, p 30.

10 NE for 24 January 2017, p 63.

11 NE for 24 January 2017, p 20.

Defendants' case

5 The defendants' case was narrated by Chen. Dongwu Steel is a company in the business of supplying grating and other metals. Chen explained that where the scope of Dongwu Steel's contracted works included the installation of such materials, this would be subcontracted to another company. At the material time, Dongwu Steel operated as a sub-sub-contractor at the worksite for the supply and installation of drain grating and chequered plate covers ("the contracted works").

6 As Dongwu Steel was short of labour for the contracted works, Chen arranged to meet Sujan, whom he understood to be a labour supplier, for a job interview with a view to engaging Sujan's company to supply workers to Dongwu Steel. Chen thus arranged to meet Sujan to bring him to the worksite for the job interview. When Chen arrived at Joo Koon MRT station on 21 September 2014 to pick Sujan up, Sujan introduced Shohel to him. Chen did not expect to see Shohel as he was there to meet Sujan only. Chen claimed that that was the first time he had ever met Sujan[12] and Shohel.

7 Chen left Sujan and Shohel at the guardhouse of the worksite and proceeded to park his car before returning to the guardhouse to meet them. At that time, there was no guard at the guardhouse. Chen then filled in a VA Form each for Sujan and Shohel. He obtained the particulars required for the filling in of the VA Forms from their work permits. This was the first time Chen saw Sujan and Shohel's work permits. Chen then informed Sujan that both he and Shohel had to sign the VA Forms, which they did. He also instructed them to

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[12] NE for 25 January 2017, p 7.

wait at the guardhouse for their VA Forms to be processed by the guard (who was not there at that time) and went to attend to some pressing matters. Throughout the entire time, Chen only spoke to Sujan and did not speak to Shohel at all.

8 About one hour later, Chen received a call from Sujan informing him that Shohel had "fallen into a hole", which, according to Chen, was the basement of the substation building situated inside the worksite. Chen stated that Sujan and Shohel had entered the building without his knowledge or consent. Chen then brought Shohel to Westpoint Hospital.

9 Chen claimed that Sujan and Shohel kept and did not return the VA Forms to Chen on 21 September 2014. Chen only retrieved Shohel's VA Form from Shohel at the hospital about a week later. Chen could not retrieve Sujan's VA Form from Sujan despite having contacted him. Chen reckoned that Sujan was refusing to return his calls and was avoiding him as Sujan had borrowed money from Chen after Shohel's accident.

10 As for the Accident Statement, Chen stated that on the morning of 1 October 2014, he visited Shohel in hospital and confirmed three matters with him. First, that Chen did not know Shohel prior to the accident. Second, that it was Sujan who brought Shohel to the worksite on 21 September 2014, and third, that it was Sujan who instructed Shohel to move the metal plate.[13] Chen then went back to his office and typed out the contents of the Accident Statement and returned the same afternoon to the hospital. He then read the Accident Statement to Shohel word for word, and told to him that he needed this statement in order

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[13] NE for 25 January 2017, p 27.

to make the insurance claim. Shohel signed the Accident Statement in Chen's presence.

My decision

11 Although Shohel's pleaded case was premised on various causes of action, namely negligence and breach of duty by an employer, occupiers' liability, and breach of statutory duty under the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed), in closing submissions, the parties proceeded only on the first. The trial was also bifurcated; I therefore only had to make findings on the issue of liability.

Whether Shohel was engaged by defendants to perform work on 21 September 2014

12 It was not disputed that Shohel was at the material time an employee of SPG Marine and that on 21 September 2014, Chen brought Shohel and Sujan to the worksite at which Dongwu Steel was operating as a sub-sub-contractor.[14] It was also not disputed that Shohel and Sujan were carrying a metal plate when Shohel fell into a "hole". The question, however, was whether Chen had instructed Shohel to carry the metal plate and had therefore engaged Shohel to work for the defendants. The defence counsel put to Shohel that it was Sujan who had instructed him to carry the metal plate. In my view, and for reasons which I will explain, this did not mean that Chen did not also instruct Shohel, through Sujan, to perform work on that day at the worksite. If so, the defendants would have engaged or employed Shohel on that day, albeit without a valid work permit.

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[14] Chen's affidavit of evidence-in-chief ("Chen AEIC"), paragraph 4.

13 I begin with Chen's meeting with Sujan. I note that Sujan was not called as a witness and could not therefore provide evidence pertaining to this meeting. Chen claimed that he did not know Sujan or Shohel and had never met them before. I disbelieved Chen that he met Sujan for the first time only on 21 September 2014. Chen claimed that when he picked Sujan and Shohel from Joo Koon MRT station on that day, he did not verify their identities.[15] Even if I accepted Chen's submission that he could not stop his vehicle for long when he was picking Sujan and Shohel up from the MRT station, one would have thought that he would have, at the very least, done a quick verification before letting two strangers into his car and driving them to the worksite. The handphone messages that Chen produced[16] were neutral – they did not establish that Sujan met Chen for the first time on 21 September 2014.

14 Chen stated that he knew Sujan and Shohel were work permit holders when he was purportedly filling in the VA Forms at the guardhouse. However, he claimed that he merely had a "glance" at their work permits and did not pay "special attention" to or "memorise" the particulars therein.[17] He did not verify whether they were employed by someone else at that time, although his intention was to interview Sujan for work or for the supply of manpower. One would have thought that if Chen was indeed looking for manpower, it would have been important for him to verify the employment status of Sujan and Shohel, who were work permit holders. Chen's evidence at trial was that he had

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15 NE for 25 January 2017, p 8.

16 Chen's AEIC, exhibit CYB-2.

17 NE for 25 January 2017, p 10-12.

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checked the expiry date of their work permits as this indicated whether they were working legally in Singapore.[18]

15 From the above, I could not but infer that Chen must have known Sujan prior to 21 September 2014. This explained why Chen did not bother to verify Sujan's identity when he first met him at the MRT station or verify his employment status subsequently. This is leaving aside the issue of the time and circumstances under which the VA Forms were filled in, to which I will turn later (at [19]).

16 I accepted Shohel's testimony that Chen had instructed him and Sujan to perform work at the worksite, and that it was Sujan who conveyed to Shohel Chen's instructions as Shohel did not understand English. Chen's position was also that he spoke only to Sujan as he could not communicate with Shohel. The defendants' case was that Sujan and Shohel were never instructed by Chen to carry out any works whatsoever, but that they were merely at the worksite for a job interview. If so, there would have been no reason for Sujan to have, on his own volition, instructed Shohel to carry metal plates. There would also have been no reason for the both of them to voluntarily carry the heavy metal plates especially if Chen's story was to be believed, namely that he had told them to wait at the guardhouse and had not informed them of their pay, let alone the type of work to be performed.

17 Shohel stated in cross-examination that he was instructed by Chen to carry some metal plates from the inside to the outside of the worksite, whereas

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[18] NE for 25 January 2017, p 13.

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his statement of claim stated that he was instructed to carry the metal plates from the outside to the inside of the worksite[19] This did not materially affect his testimony. I accepted that he could not recall which way round it was because this incident happened approximately two years ago.[20] The fact remained that Shohel was carrying a metal plate when the accident happened.

18 Further, although the statement of claim was inaccurate in so far as it pleaded that Chen was Shohel's lawful employer under the work permit, this was not fatal to Shohel's case. Shohel's pleadings made it sufficiently clear that he was alleging that he had performed work under Chen's instructions. The object of pleadings is to enable both parties to come to court prepared to answer what the other side alleged such that neither party is taken by surprise (*Rajendran a/l Palany v Dril-Quip Asia Pacific Pte Ltd* [2001] 1 SLR(R) 887 at [19]; *Cheng William v Allister Lim & Thrumurgan and another and another appeal* [2015] 3 SLR 201 at [16]). The defendants were not taken by surprise as to the crux of Shohel's claim.

19 I turn then to the VA Forms and Accident Statement. The circumstances under which the two forms were signed were important. If Shohel and Sujan's VA Forms were signed at the guardhouse, it would lend support to the defendants' case that Shohel and Sujan were merely there for an interview and Chen had left them at the guardhouse (without instructions to do any work) for the VA Forms to be processed. If the VA Form was signed by Shohel when Shohel was hospitalised, it would lend support to Shohel's version of the events.

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19 Statement of claim, paragraph 8.

20 NE for 24 January 2017, p 16.

20 Chen claimed that he made Shohel sign the VA Form at the guardhouse on 21 September 2014, after Chen filled it in with all the relevant particulars. Chen also claimed that Shohel and Sujan kept their respective VA Forms and Chen was only able to retrieve the VA Form from Shohel after he was hospitalised. On balance, I preferred Shohel's testimony that he did not sign the VA Form at the guardhouse that day, but only signed it whilst in hospital. I also accepted Shohel's evidence that at that time, the VA Form was not filled.

21 If Chen had filled in the VA Form for Shohel and Sujan at the guardhouse based on the particulars on their work permits, it was highly doubtful that Chen would not notice that Shohel was already employed by someone else (even if Chen did not "pay special attention" to or "memorise" the particulars of the work permit as he claimed) or that Shohel's occupation was that of a "marine trades worker". Chen's evidence was that he had checked the expiry date of Sujan and Shohel's work permits as this would indicate whether they were working legally in Singapore.[21] If so, Chen was clearly aware of the law governing the employment of foreign workers in Singapore, namely that a foreign worker must have a valid work permit to work for a *specified* employer. Hence, it would have been logical for Chen to ask them why they were seeking a job interview, or alternatively, to send them away since they were already work permit holders engaged by another employer. Instead, Chen proceeded (as he later admitted in cross-examination) to show them a plan of the installation works and even asked Sujan to give him a quotation for the supply of manpower (see [25] below). Chen's explanation that he did not send Shohel or Sujan away because he thought that Shohel was one of Sujan's men, that they were there

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[21] NE for 25 January 2017, p 13.

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merely for an interview, and that they could have been workers from a labour company who would subsequently recommend the job to their bosses, was unconvincing.[22] I found that Chen did not send Sujan and Shohel away, even though he knew they were work permit holders engaged by another employer, because he had intended to engage them to perform work that day.

22 More pertinently, Chen's claim that he filled in all the particulars on Shohel's VA Form before Shohel signed it, belies an important detail. The time of visit stated on the VA Form was "10.30 am – 11.30 am", which was an hour's duration. This coincided with Chen's evidence that Sujan informed him of Shohel's fall about an hour after he dropped Sujan and Shohel off at the guardhouse. It also coincided with his evidence in court that after he had purportedly filled in the VA Forms at the guardhouse, he left Shohel and Sujan there for approximately 45 minutes before Sujan informed him about Shohel's fall.[23] At the time Chen purportedly filled in the VA Form (which was at the *beginning* of Shohel's arrival at the worksite), he could not have known the time the visit would end or how long the entire visit would last. I could not but infer that the VA Form was filled in after the event, because by that time, it would have become clear how long Shohel had been at the worksite. I was unpersuaded by Chen's explanation that the time stated in the VA Form was but a mere estimate[24]. Chen's evidence was that he had left Shohel and Sujan at the guardhouse because he had to attend to pressing matters. If so, it was unlikely that Chen could have estimated, in advance, the length of their visit when he did not know how long it would take to process the VA Form (bearing in the mind

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22 NE for 25 January 2017, pp 22-23.

23 Chen's AEIC, paragraph 10; NE for 25 January 2017, p 22.

24 NE for 25 January 2014, p 38.

there was no guard at the guardhouse at that time). It was also unlikely that he would have provided such an estimate as he was rushing off to attend to other matters. Chen stated that he did even not know what time he would finish dealing with his urgent matters before he could interview Sujan. Chen also did not know how long the interview would last, particularly since he claimed that he was tied up and very busy[25] with some other matters then. I was of the view that this small but important detail pertaining to the time of Shohel's visit was overlooked by Chen in his attempt to prepare the VA Form after the accident and to obtain Shohel's signature at the hospital.

23 As for the Accident Statement, I once again preferred Shohel's testimony to Chen's. Chen claimed that he read the contents of the Accident Statement back to Shohel word for word, and that Shohel also read it before he signed it. I was very doubtful of this. Chen's evidence was that he did not communicate at all with Shohel at the worksite on 21 September 2014 as Shohel did not understand English.[26] Yet, in less than two weeks, on 1 October 2014, he was able to have a substantial conversation, in English, with Shohel at the hospital.[27] According to Chen, at the hospital, Shohel related the accident to Chen[28] and was asked by Chen to confirm three matters (see [10] above) which Chen then included in the Accident Statement. Chen then returned to the hospital on the same day, read the Accident Statement "word-for-word" to Shohel and asked him to sign it. Chen also claimed to have informed Shohel

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25 NE for 25 January 2014, pp 19, 21–22.

26 See also NE for 25 January 2017, p 46.

27 NE for 25 January 2017, pp 28–29.

28 NE for 25 January 2017, p 46.

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that Sujan had gone missing and that without the Accident Statement, Chen could not process the insurance claim. Chen claimed that all these took place in English and that Shohel understood him.[29] In my view, it was hardly believable that Chen would suddenly be able to converse with Shohel in English on 1 October 2014 when his evidence was that he did not speak to Shohel on 21 September 2014 because Shohel could not understand him then. For these reasons, I found that Shohel did not communicate with Chen on 21 September 2014 because of the language barrier and for the same reason, did not know the nature of the Accident Statement which he signed whilst in hospital. In contrast to Chen's testimony, Shohel was consistent in maintaining that he could not communicate with Chen. In my view, Chen's claim that Shohel understood him on 1 October 2014 was a lie that served to bolster his submission that the contents of the Accident Statement were filled in, and that Shohel had understood the contents therein, before he signed it.

24 Further, the contents of the Accident Statement were inconsistent with Chen's initial testimony at trial. Chen initially testified that he left Shohel and Sujan at the guardhouse after he had filled in their VA Forms and did not speak to them about work. According to Chen, the next time he saw Shohel was after the accident. Yet the Accident Statement, which was prepared by Chen, stated that Chen had provided Shohel and Sujan with a "drawing for study", that Chen had showed them the "material for job trying", and that Chen had wanted to know whether they were able to do the job.

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[29] NE for 25 January 2017, p 29.

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25 When this was pointed out in cross-examination, Chen's testimony took a drastic shift; he admitted that he had provided Sujan with a plan for the installation project for which Chen required manpower and pointed out to Shohel and Sujan the relevant materials (*ie*, the metal plates) at the worksite[30]. Chen also admitted that he asked them to take a look at the site condition to see whether they could do the work and to give him a quotation for the manpower based on the site condition. This clearly contradicted Chen's earlier testimony that he never spoke to Shohel and Sujan about the work that he required. It was clear that, based on Chen's own admission, he had spoken to them, at least briefly, about the scope of intended work, but stopped short of admitting that he had instructed them to proceed to work.

26 Chen's conduct was also inconsistent with his explanation that that he had no intention to engage Sujan and Shohel on 21 September 2014 to work because he "could tell that they couldn't do the work" and he "didn't have a good impression of them".[31] If so, it was puzzling that he would, as he admitted, proceed to show Sujan a plan for the installation project and ask Sujan and Shohel to look at the worksite condition and to give him a quotation for the manpower. Further, if he truly did not intend to hire Sujan and Shohel, it is puzzling why he would ask them to wait at the guardhouse, for an indefinite period of time, whilst he attended to his urgent matters.[32]

27 Taking all the evidence together, including Shohel's explanation (which I accepted) that he was asked to sign the two forms, which were unfilled, at the

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30 NE for 25 January 2017, pp 47-48.

31 NE for 25 January 2017, p 52.

32 NE for 25 January 2017, p 44.

hospital, I was of the view that Chen was trying to conceal the fact he had engaged Shohel and Sujan on 21 September 2014 to perform work at the worksite. He did this by attempting to show that the only purpose of their visit at the worksite was for a job interview. I found that the two forms were but mere self-serving documents that Chen prepared on behalf of the defendants.

28 Before me were also two loan agreements that Chen claimed were signed by Sujan. According to Chen, Dongwu Steel had, at Sujan's behest,[33] agreed to lend money to Sujan to discharge Shohel's hospital bills via these loan agreements. According to the defendants, this did not go towards any admission of liability by Dongwu Steel. There was insufficient evidence for me to make a finding with respect to the purpose of the loan agreements. Since Sujan was not called as a witness, no evidence could be obtained from him regarding the purported loans. Nonetheless, in my view, it was unlikely that Sujan would have undertaken the responsibility of bearing Shohel's hospital bills by asking Chen for a loan to discharge the bills. There was no evidence that Shohel was Sujan's employee. It was more likely that, if Dongwu Steel had extended the loans, it was in the hope that Shohel would not make any further claims against Dongwu Steel. Whilst I make these observations, my findings with respect to the defendants' liability do not turn on them.

29 Overall, I found Shohel to be an honest and reliable witness. Although he had difficulty expressing himself and had a poor understanding of English, I saw no reason to doubt his testimony. He was essentially doing some extra work on his day off, albeit illegally. I accepted that he was introduced to Chen by Sujan. It was inconceivable that Shohel would have gone to the worksite on his

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[33] NE for 25 January 2017, p 35.

day off and started carrying the heavy metal plates if he had not been instructed to do so, and if he had not been informed that he would be paid for his work. On the contrary, I found Chen to be an evasive and dishonest witness who, as explained above, provided inconsistent evidence on key matters.

Liability of the defendants and public policy

30 My finding that Shohel was instructed by Chen to carry the metal plates for Dongwu Steel's installation works at the worksite meant that the defendants had engaged Shohel as their worker on 21 September 2014. At this juncture, I deal briefly with the defendants' submission that Sujan was not their agent and did not have their authority to engage Shohel to work for them. To my mind, this submission misses the point as the issue of agency did not surface in the present case. My finding that Shohel was instructed by Chen to carry the metal plates meant that Chen had directly engaged Shohel to perform work for Dongwu Steel. In any case, the fact that Sujan conveyed Chen's instructions to Shohel did not make Sujan the defendants' agent. Sujan was but a mere translator necessary for Chen to convey his instructions to Shohel due to the language barrier existing between them.

31 The defendants further argued, in closing submissions, that public policy militated against imposing a duty of care on the defendants as employers, as any contract of service entered into between the parties would have been contrary to the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA"), which clearly prohibits moonlighting by foreign employees. Paragraph 1 of Part VI of the Fourth Schedule to the Employment of Foreign Manpower (Work Passes) Regulations 2012 (GN No S 569/2012) (the "Regulations") expressly states that "foreign employee[s] shall work only for the employer specified and in the occupation and sector specified in the work

permit". A foreign worker who chooses to moonlight in breach of his work permit disregards the conditions of his employment under the work permit. Therefore, finding that a duty of care was owed by the defendants as employers to such foreign employees would be contrary to public policy.[34]

32 I was cognisant of the fact that the defendants' allegations of Shohel's illegality and the issue of public policy was not specifically pleaded despite the fact that O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) requires a party to "plead specifically any matter …. showing illegality". Nonetheless, I was of the view that even if the defendants had pleaded the aforementioned matters (see above at [31]) in respect of the Shohel's illegality, public policy would not negate a finding of a duty of care. I rejected the defendants' argument that Shohel's breach of paragraph 1 of Part VI of the Fourth Schedule to the Regulations negated a finding of a duty of care owed by the defendants to Shohel. To my mind, this submission blatantly ignores the fact that the defendants themselves had breached the law by employing a foreign worker without a valid work permit to work for them.

33 In *Ooi Han Sun and another v Bee Hua Meng* [1991] 1 SLR(R) 922 ("*Ooi Han Sun*"), the plaintiff, who was a Malaysian, was a passenger in his employer's vehicle which was involved in a road accident. He did not possess a work permit in Singapore at the time of the accident. Yong Pung How CJ held at [15] that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) has "only very limited application in tort" and that "the fact that the plaintiff is involved in some wrongdoing does not itself provide the defendant with a good defence". The only exceptions would appear to be the

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[34] Defendant's closing submissions at p 26.

limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of a commission of a crime. Yong CJ added that this would be "in line with the public policy in Singapore which is reflected in the Contributory Negligence and Personal Injuries Act (Cap 54, 1989 Rev Ed) under which a claim will not be defeated by reason of the fault of the person suffering the damage; and in the Workmen's Compensation Act (Cap 354) which provides that a workman will not be prevented from suing for recovery of compensation even under an illegal contract". Although Yong CJ's observations were made in respect of *ex turpi causa* as a defence, the principles pronounced remain relevant to the court's finding of a duty of care in the tort of negligence because the defence of illegality rests upon the foundation of public policy (see *Hounga v Allen and another* [2014] 1 WLR 2889 ("*Hounga*") at [42]). I note that the courts have, apart from treating *ex turpi causa* as a defence, also examined the concept as part of the *prima facie* inquiry into a duty of care or standard of care in the tort of negligence (see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd ed, 2016) at para 08.010 and, for example, *Ashton v Turner and another* [1981] 1 QB 137 at 146).

34 The case of *Hounga* is also instructive. In that case, the UK Supreme Court dealt with a claim by a victim of unlawful discrimination in relation to her dismissal under an employment contract, a statutory tort. The claimant, however, achieved her entry into the UK through illegal means and therefore had no right to work in the UK. The court held (at [40] and [45]) that the defence of illegality did not defeat her claim because her illegality "provided … no more than the context" for the first respondent's discriminatory acts, such that the connection between the alleged tort and the illegality was insufficient to bar the claim. Lord Wilson examined what (if any) public policy considerations underlying the doctrine of illegality militated in favour of applying the defence

to defeat the victim's claim. In particular, his Lordship considered the importance of preserving the integrity of the legal system. He described as "fanciful" the idea that an award of compensation to the victim would compromise the integrity of the legal system by appearing to encourage others to enter into illegal contracts of employment. Lord Wilson was of the view that the integrity of the legal system would be compromised if the victim's claim was not allowed because "it might engender the belief that [employers] could even discriminate against such employees with impunity" (at [44]).

35 In the light of *Ooi Han Sun* and *Hounga*, I was of the view that public policy and the preservation of the integrity of Singapore's legal system would warrant the imposition of a duty of care on the defendants. In the present case, Shohel's illegality merely provided the context for the defendants' negligence and cannot be said to fall within the limited range of cases in which an injury was directly incurred in the course of committing a crime. Finding that public policy militated against the imposition of a duty of care might engender a belief among employers that they can discriminate against such employees whom they choose to hire despite knowing that it is illegal (by, for example, providing them with little or no safety equipment). In my view, this would run counter to the policy of the protection of these workers at the workplace and may even encourage or embolden employers in employing foreign workers illegally, knowing that the employer would be absolved from any liability to compensate a worker who suffered injuries through the fault of the employer in the course of that employment.

36 Next, I accepted that Shohel did not exercise sufficient care to keep a proper lookout as he was walking at the worksite. This, however, did not defeat his claim in the entirety. It was held in *Parno v SC Marine Pte Ltd* [1999] 3

SLR(R) 377 at [45], that the common law duty of employers vis-à-vis employee is three-fold – to provide a competent staff of men, adequate material, and a proper system and effective supervision. Likewise, in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 ("*Chandran*") at [15], it was held that the common law required employers to take reasonable care for the safety of their employees in all the circumstances of the matter. The defendants thus had a duty to provide Shohel with a safe place of work, adequate material, and effective supervision. Further, the courts have held that an employer remains responsible for the safety of his employees even if they were sent to work at a site controlled by others (see *Chandran* at [19]; *Sim Cheng Soon v BT Engineering Pte Ltd and another* [2007] 1 SLR(R) 148 ("*Sim Cheng Soon*") at [29]). Therefore, the fact that Dongwu Steel was merely a sub-sub-contractor at the worksite did not preclude a finding that the defendants had breached their duty of care.

37 Hence, I was satisfied that there was fault on the part of both Shohel and the defendants (see further below at [42] to [44]). The issue then became one of determining the extent to which it was just and equitable to reduce the damages which would otherwise be recoverable by the plaintiff (see *Sim Cheng Soon* at [28]).

Contributory negligence

38 I was of the view that the defendants, as the parties with a greater degree of blameworthiness, should be made to bear a greater proportion of the liability for the personal injury caused to Shohel. For reasons which I will explain, I apportioned liability at 80% to the defendants. It would be apposite, at this juncture, for me to set out the cases which I found instructive in determining the appropriate apportionment of liability between Shohel and the defendants.

39 In *Sim Cheng Soon*, the plaintiff was a welder who was working at the second respondent's shipyard when he fell through an uncovered and unfenced opening in the platform on which he had been working. The accident took place in broad daylight and there was enough natural lighting for the plaintiff to see where he was going. The plaintiff had worked in shipyards in the past and had undergone safety courses at the shipyard. He also attended safety talks and meetings both generally and specifically for the conversion works to be done of the vessel. He was familiar with the layout of the place where he was working. The court found that the plaintiff had not looked at where he was going and that that was the immediate cause of the accident. He was negligent in failing to observe the ordinary care which an ordinary prudent person would have taken for his own safety. As blameworthiness was there and to a higher degree than that of the defendants as employer and occupier of the site respectively, the plaintiff's liability was apportioned at 60%. Hence, the plaintiff was only entitled to 40% of the damages.

40 In *Xu Ren Li v Nakano Singapore (Pte) Ltd* [2012] 1 SLR 729, the plaintiff construction worker was using a staircase in an uncompleted building at the construction site when he lost his balance on one of the steps and fell against a wall and landed on his buttocks. The plaintiff was aware that there was no lighting at the staircase and the staircase landings were only dimly lit. He was also aware the steps on the staircase were unfinished and uneven. Hence, the court found that he should have exercised care when using the staircase. The court also found that the plaintiff was rushing down the stairs, which significantly increased the risk of the accident happening and contributed to the degree of his injuries. However, because it was difficult to determine which party was more at fault, liability was apportioned equally between the parties. Hence, the plaintiff was only entitled to 50% of the damages.

41 In *Manickam Sankar v Selvaraj Madhavan (trading as MKN Construction & Engineering) and another* [2012] SGHC 99, the plaintiff fell as he placed his foot in a wrong place whilst crossing a catwalk. The court found him contributorily negligent to the extent of one-third. The court stated that the plaintiff could have taken more care for his safety. He should not have taken the risk of crossing when he did not know how to secure the safety harness, although the court opined that this should not be counted as a very significant factor against the plaintiff given that he was a new worker. Further, the court found that no steps were taken to ensure that all the workers knew how to hook their safety harness properly. In that case, the poor lighting made it difficult for the plaintiff to differentiate between the catwalk and the ceiling panels. Although the plaintiff was paired with one Kannan who was a more experienced worker, the defendant did not call Kannan as a witness to substantiate its assertion that Kannan had warned the plaintiff of the dangers and taught him to hook his safety harness or how to navigate the catwalk.

42 In the present case, I accepted that Shohel did not exercise sufficient care for his own safety by failing to keep a proper lookout, despite being fully aware that he was working at a construction site. I noted that Shohel was also performing the task in daylight. However, there was no evidence given as to the description or the exact size of the "hole" into which Shohel fell. What was clear, however, was that the "hole" had to be of a sufficient size for a person to fall into and that Shohel would have noticed it if he had kept a proper lookout.

43 Nevertheless, this must be balanced against the fact that Shohel was sent off to work immediately at a worksite with which he was unfamiliar. He was not given any opportunity to familiarise himself with his surroundings or given any safety briefing or instructions on how to perform his task. He was not

supervised or provided with any safety equipment or gear. The metal plates were large (approximately 4 feet by 5 feet), heavy and quite difficult to carry even by two persons.[35] The size of the metal plate would, in all likelihood, have made it more difficult for Shohel to keep a proper lookout when he was walking. There was no evidence that Shohel was experienced in performing work of such nature or that he had gone for any courses relating to the type of work that he had performed at the worksite. In fact, Shohel's evidence, which I accepted, is that he had never performed this type of work before.[36] Further, as he was not briefed on the surroundings of the worksite, he was most likely unaware of any openings in the ground, namely the "hole" or "basement".[37] There was also no evidence as to whether this "hole" or "basement" was properly barricaded, covered, or secured, or whether any signs were placed nearby to warn persons of it. As I have explained above at [36], the fact that Dongwu Steel was only a sub-sub-contractor at the worksite did not absolve it of its responsibility to maintain a safe workplace for its workers.

44 The defendant bears the onus of establishing contributory negligence on the part of the plaintiff (see *Ng Swee Eng (administrator of the estate of Tan Chee Wee, deceased) v Ang Oh Chuan* [2002] 2 SLR(R) 321 at [59]). Although Shohel had to keep a proper lookout and exercise sufficient care for his own safety, little evidence, if any, was proffered on the degree of his blameworthiness which contributed to the accident, or what precautions or steps were taken by the defendants to minimise the risk of such accidents at the worksite. What was borne out by the evidence was the defendants' complete

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35 NE for 24 January 2017, p 14.

36 NE for 24 January 2017, p 37.

37 Chen's AEIC, paragraph 10.

failure to take any steps to protect Shohel's safety at the worksite (see above at [43]).

45 The apportionment of liability is more an exercise of discretion than in clinical science (*Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 at [87]). As the Court of Appeal stated in *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [118] (in the majority decision), "it has been said that a finding of apportionment is a finding upon a question, 'not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis and of weighing different considerations'" (citing *British Fame (Owners) v MacGregor (Owners)* [1943] AC 197 at 201). The court also observed that the apportionment exercise should be applied in a "rough and ready" manner, for the factors that the court is required to consider are "incapable of precise measurement" and are often "incommensurable". Two considerations emphasised by the Court of Appeal were the relative causative potency of the parties' conduct and the relative moral blameworthiness of their conduct.

46 Taking into consideration all the circumstances of the present case, I was of the view that a greater degree of blameworthiness should be attributed to the defendants and that Shohel was contributorily negligent to the extent of 20%. I therefore found that the defendants were to bear 80% of the liability for the accident, on a joint and several basis.

Costs

47 I also awarded costs of the action to Shohel, with costs of the assessment of damages to be reserved to the court conducting the assessment. As with *Sim Cheng Soon*, I exercised my discretion to award the costs of the action entirely

to Shohel as he was the successful party despite the apportionment of liability. Shohel's claim was not defeated by a finding of some fault on his part. In keeping with the costs guidelines as set out in Appendix G of the Supreme Court Practice Directions, from which I saw no reason to depart, I awarded Shohel costs fixed at $30,000 (for approximately two days of hearing including the time taken to render my oral decision), with disbursements to be agreed between the parties.

Audrey Lim
Judicial Commissioner

Subbiah Pillai (Tan & Pillai) for the plaintiff;
Eu Hai Meng (United Legal Alliance LLC) for the defendants.